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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1951.

**No. 282**

**SWIFT & COMPANY,**

*Appellant,*

*vs.*

**THE UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION, ET AL.,**

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS.

**BRIEF FOR THE RAILROAD INTERVENERS.**

**KENNETH F. BURGESS,**

**DOUGLAS F. SMITH,**

**MARTIN M. LUCENTE,**

*Counsel for Railroad Interveners.*

**SIDLEY, AUSTIN, BURGESS & SMITH,**  
*Of Counsel.*

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**BRIEF FOR THE RAILROAD INTERVENERS.**

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**THE OPINIONS BELOW.**

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The report of the Interstate Commerce Commission appears in the record at pages 57 to 89. The decision is published as No. 29809, *Swift & Co. v. Atchison, T. & S. F. Ry. Co.*, 274 I. C. C. 557. The findings of facts, conclusions of law, and decree of the District Court dismissing the complaint appear at pages 197 to 210 of the record. No opinion was filed by the District Court. This brief is filed on behalf of the carriers who were defendants in the proceeding before the Commission and interveners in the Court below.

## STATEMENT OF THE CASE.

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It is necessary to supplement appellant's statement of the case. In the complaint by which it initiated this litigation before the Interstate Commerce Commission, Swift alleged that the applicable charges for delivery of livestock to receiving pens which it proposed to construct in Chicago consisted of the line-haul rate plus a switching charge, and that this charge was unjust and unreasonable in violation of Section 1(5)(a) of Part I of the Interstate Commerce Act, unduly prejudicial in violation of Section 3(1) of that Act, and also in violation of Sections 1(4) and 1(6). Swift asked that the Commission prescribe joint through rates applicable over the line-haul defendants and the Chicago Junction Railway under which its direct shipments of livestock would be delivered to its proposed facility at a charge not in excess of the line-haul rates to Chicago. (R. 50-56) By this complaint, Swift thus undertook to establish that the published switching charge for private track delivery of its livestock was unreasonable and otherwise unlawful, and that the joint through rates which it sought were "necessary or desirable in the public interest." (49 U. S. C., § 15(3))

Swift's witness testified that certain buildings which had become obsolete were being replaced by new structures and that stockyards for the receipt of livestock were to be constructed in an area adjacent to the new buildings. (R. 267) Although it was stated that work on the new facilities had been started at the time of the hearing (R. 269), subsequent testimony showed that construction work at the designated site had not, in fact, been commenced at that time. (R. 455-56, 931) Counsel for Swift now states that "needless to say, that plant could easily have

been built during the many months (July 28, 1947-February 6, 1950) that this case was before the Commission. (Memorandum for Appellant in Opposition to the Motions to Affirm; p. 4, footnote 1.) It is not apparent whether this is intended to mean that the plant has been built or that its construction was delayed to await the Commission's decision. If the first meaning is intended, the statement is contrary to the facts. The proposed plant has not been built and there is no visible evidence of any construction at the designated location. If the second meaning is intended counsel's statement is contradicted by the testimony of Swift's witness:

"Q. And that construction, I take it, then, does not in any degree depend upon whether or not this complaint of Swift's is granted?

"A. No, sir.

"Q. It is entirely separate and apart. I mean the complaint or what you seek in the complaint is entirely separate and apart from the considerations which have forced you, according to your informant, to build this new building?

"A. That is correct." (R. 319)

In any event, the proposed plant and facilities for receipt of livestock do not exist and the proceeding is therefore, in effect, one for a declaratory judgment.

There were numerous interventions in opposition to the complaint on behalf of producers, buyers, sellers of livestock and the Union Stock Yards. The Department of Agriculture appeared through counsel and offered evidence to show that the granting of Swift's demands would operate to increase the charges to be paid by the producers who would continue to use the public yards. (R. 567-79) After a full hearing, including oral argument to the entire Commission, and an extended presentation on brief,

the Commission, by order and report, dismissed the complaint, *Swift & Co. v. Atchison, T. & S. F. Ry. Co.*, 274 I. C. C. 557. The Commission found that the line-haul rates on carload shipments of livestock to Chicago previously prescribed by it (*Livestock-Western District Rates*, 176 I. C. C. 1; *Chicago Livestock Exchange v. A. T. & S. F. Ry. Co.*, 219 I. C. C. 531) were not designed or intended to compensate the carriers for the livestock delivery service sought by Swift, and that, considering the transportation service required for such delivery and all of the attending facts and circumstances, the published switching charge of the Chicago Junction Railway in addition to the line-haul rates was not unreasonable or otherwise unlawful for delivery of livestock to Swift's private tracks. (R. 60, 78-79, 80-81) The Commission also found that the establishment of joint rates for this traffic, as requested by Swift, would seriously disrupt and interfere with the terminal services in the stockyards area and would not be necessary or desirable in the public interest. (R. 77, 81) Swift does not assign error with respect to this finding and thus concedes that the conditions which must, by the express terms of the Interstate Commerce Act (Sec. 15(3)), precede the granting of the relief sought by it, do not exist. In fact, Swift has omitted all reference to the Commission's findings with respect to the public interest in its brief and the joint rates sought by Swift are alluded to only once and then for the purpose of advising the Court that it will be "conducive to clarity to omit all further reference to the establishment of joint rates." (Brief, footnote 15, p. 31) This is quite consistent with Swift's presentation to the Commission in which it admitted that it was not concerned with the effect of its proposal upon the producers who would continue to receive their livestock at the Union Stock Yards or upon the numerous industries in the stock-

yards area who depend upon the Junction's facilities for their rail transportation service. (R. 336-39) Swift nevertheless asks the Court to reverse the decision below and to accord to it something that has been found to be, and is in effect admitted to be, contrary to the public interest.

Following the filing of Swift's complaint, the Chicago Junction Railway, taking the position that it could not, as a practical matter, undertake to deliver livestock to the plants of the various packers in the stockyards area, amended its tariff to exempt livestock from the traffic which it would transport, although the switching rate had been in effect for many years and the Commission had found it to be applicable to livestock and not unreasonable. (*Hygrade Food Products Co. v. A. T. & S. F. Ry. Co.*, 195 I. C. C. 553) Upon the protests of Swift and other packers, this action was suspended, and was heard, as I. & S. No. 5543, with the proceeding on Swift's complaint. The Commission ordered a cancellation of the suspended schedules, and required the Junction to retain the switching charge on livestock for such emergency use as might exist for it. (R. 80-81) There has been no appeal from that order. In effect, therefore, the Commission left the terminal practices at Chicago undisturbed, denied the lower rate sought and held that Swift must pay the applicable and reasonable charges for the service it desires.

On appeal to the three-judge District Court, Swift raised each of the issues which it raises here. Comprehensive briefs were filed, and an entire day was devoted to oral argument. That Court affirmed the Commission's action. It found that the Commission's findings were adequately supported by the evidence of record, that those findings were adequate to support the Commission's order, and that the Commission's findings and order conformed to the applicable and governing principles of

law. (R. 209) Thereafter, an order dismissing Swift's complaint was entered and the present appeal followed.

In order to comprehend the extreme nature of Swift's complaint and the soundness of the decision below, an appreciation of the historical development of livestock delivery practices in Chicago is essential. Beginning with the Yard Company's operations in 1865 the Chicago packers utilized the public yard for the receipt of their livestock, and paid the yardage charges assessed by that concern.<sup>1</sup> At a time when this practice was approximately 25 years old, Swift and the other Chicago packers decided that their patronage was a thing of value and that the Yard Company should be forced to allow the packers to participate in its profits. Their strategy was simple and effective. They purchased property located near the Union Stock Yards, and constructed their own private stock pens for the purpose of receiving their direct shipments. (Ex. 42, R. 892, 1179) The packers also filed a complaint in an Illinois Court by which they sought to force the Yard Company to permit the line-haul carriers to use its track in making deliveries to their new facility which they called the "Central Stock Yards." (Ex. 42, R. 892, 1179)

The successful culmination of this strategy was described by the Court in *Swift & Co. v. United States*, 316 U. S. 216, as follows:

"Having put themselves in this independent position and threatened to reduce the revenues of the Yard Company, the packers negotiated a contract which, in substance, involved the abandonment by the packing companies of this threatened move to Indiana and surrender of their own facilities for receiving direct shipments in return for a participation in the

<sup>1</sup> The facts recited in this portion of the brief appear in greater detail in *Swift & Co. v. United States*, 316 U. S. 216 at 227-230 and in exhibit 42, R. 892, 1174-1638.

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profits and capital of the Yard Company. In 1892, the packers conveyed to Stock Yard interests the Indiana site and the Central Stock Yards, and agreed by contract to dismiss the suit filed in the Illinois court and to refrain from filing any similar suit for a period of fifteen years; to continue their business at Packingtown, adjacent to the Union Stock Yards, for fifteen years from July 1, 1891; to have all livestock slaughtered by them on their premises or within two hundred miles of the City of Chicago, during such period, pass through and use the Union Stock Yards, and to pay the usual yardage charge therefor; and they guaranteed that the Yard Company would receive and collect from its yardage charges on packers' livestock the aggregate sum of \$2,000,000 within six years, and agreed to make up any deficiency in that amount. *The packers also agreed that, as long as the Yard Company conducted its business in Chicago, they would not interest themselves in any other stockyards in Chicago for the receipt and use of their own livestock.* 7

"The packers received income bonds of a new corporation, the security of which was the revenues of the Stock Yards, in the amount of \$3,000,000. Swift received approximately one-third. These bonds were subsequently redeemed by the issuing corporation.

"The railroad companies were not parties to this agreement, and the Commission found that the packers, at the time the agreement was entered into, did not consider the assessment of the yardage charges to be a matter of any concern to the railroads. During the existence of the agreement described, the packers paid the yardage charges, and participated in the receipts from such charges. *This agreement expired*

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in 1907, except for the covenant by the packers not to establish or become interested in any other stockyards for the receipt of their livestock so long as the Yard Company maintained its business in Chicago. It appears, however, that after the expiration of the contract the Yard interests were informed that the packers were still threatening to move their plant from Chicago, and it appears that Swift expected to receive a share of the Yard's earnings as late as 1918, but there is no proof that it did receive anything in addition to the bonds received under the contract of 1892. J. O. Armour, of Armour & Company, however, received substantial benefits after 1907." (pp. 228-30, italics added)

The result was that the Union Stock Yards continued as the sole public terminal for the delivery of livestock in Chicago and has retained that status to this day.<sup>1</sup> In the first of a series of Chicago stockyard cases, this Court stated: "That the yards are, in effect, terminals of the railroads is clear. *They are in effect used as terminals and necessarily so.*" (*Adams v. Mills*, 286 U. S. 397 at 409, italics added) Deliveries at the public yards are made by the line-haul carriers operating over the Junction's main running tracks. (R. 469) The Junction itself has never, except in emergencies, handled any livestock but has instead devoted its yards and other facilities to the

<sup>1</sup> About 1915 or shortly prior thereto, Swift began the practice of consigning some of its direct shipments to private pens maintained by it at the site of the Omaha Packing Company, a Swift subsidiary, located a distance of some 2½ miles from the stockyards area. (R. 262, 265) Swift continued to receive other shipments of its directs at the Union Stock Yards, however, and in 1929 and for several years thereafter, a substantial number of such direct shipments were received at that terminal. (*Swift & Co. v. Alton R. Co.*, 238 I. C. C. 179 at 183.) After 1938, Swift consigned practically all of its directs to the Omaha plant pens on the rails of the Burlington. (*Swift & Co. v. Alton R. Co.*, 238 I. C. C. 179 at 183.)

receipt and delivery of dead freight consigned to the 499 industries served solely by it. (R. 483, 520) Since the inception of the Union Stock Yards in 1865, the terminal practices in the stockyards area have thus followed a pattern which was fostered and shaped by the packers themselves. With respect to livestock, the customary and accepted usage has been for delivery to be made by the line-haul carriers at the Union Stock Yards. Dead freight on the other hand, has been handled by the Junction, that line receiving the freight from the line-haul carriers, classifying it in the yards designed for that purpose and switching the cars to the appropriate consignee. During this same period, the stockyards area has become one of the most intensively developed industrial areas in the world, and the transportation facilities in that area have developed in conformity with the customary and long standing practices of delivery with respect to livestock and dead freight.

In its report in the *Chicago Junction Case*, 71 I. C. C. 631 (1922), the Commission discussed in detail the operations of the Chicago Junction, and with respect to the handling of livestock, it stated:

"The movement of livestock in and out of the Junction yards is essentially different from the method of handling the dead freight, in that each carrier moves its trains to the unloading chutes with its own power, and goes into the pens for outbound stock destined for its own line. *All parties concede that that is the only practical method of handling that traffic.*" (p. 633, italics added.)

As the record before the Commission in that proceeding shows, Swift intervened and was a party. (Transcript of Testimony, I. C. C. Finance Docket No. 1165, p. 2) This finding reflects Swift's recognition over a period of several generations that the physical circumstances and the result-

ing terminal practices in the stockyards area make the delivery which it now seeks an extremely difficult and impractical operation.

At a time when the terminal practices described above were approximately 65 years old, the Hygrade Packing Company, one of Swift's small competitors, filed a complaint with the Commission asking delivery of livestock at its private tracks in the stockyards area without the payment of the applicable switching charge. This is precisely what Swift is seeking here, and Swift intervened in the proceeding and vigorously opposed plant door delivery of livestock. The Hygrade Company also challenged the imposition of yardage charges on shipments of its directs to the Stock Yards. *Hygrade Food Products Corp. v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553.

To support its attack upon the Junction's switching charge for plant door delivery of livestock, the Hygrade Company alleged that delivery of livestock to Swift's subsidiary in Chicago, the Omaha Packing Company, without the assessment of such a charge, constituted violations of Sections 2 and 3 of the Interstate Commerce Act. Swift's counsel (R. D. Rynder and W. N. Strack, who have also represented Swift throughout this proceeding) appeared at the hearings on behalf of its subsidiary, and Swift's Assistant to the Freight Traffic Manager testified in that proceeding. As stated in the brief filed with the Commission by Swift's subsidiary:

"Omaha Packing Company is one of the subsidiaries of Swift and Company and all of its transportation matters are handled by Swift and Company." (Appendix A, p. 3)

Consequently, that brief, which has been reproduced as Appendix A hereto, was in reality filed by Swift in support of its militant opposition to Hygrade's request for the

plant door delivery of the livestock in this area adjacent to the public stockyards. That document, consisting of 64 pages, is in its entirety, a most forceful defense of the long-established custom of delivering livestock in the congested stockyards area only at the public yard. The Court will note, in particular the full and detailed statements made by Swift as to the difficult and impossible operating conditions which would be encountered in delivering livestock, through the Junction's Ashland Avenue Yards, to the Hygrade plant, located in the same area in which Swift now seeks that same service, and what are characterized by Swift as the demoralizing effects that would attend that practice. (Appendix A, pp. 41-52) The facts as stated by Swift in that case are the facts found by the Commission in this case on the basis of the uncontradicted testimony in the record now before the Court. We respectfully submit that the validity of Swift's present attempt to impeach the Commission's findings and order may be judged by reference to the factual representations and argument by which Swift successfully opposed the Hygrade Company's attempt to secure plant door delivery of livestock without payment of the applicable switching charge. The Commission found in that case, as it did here, that the switching charge was not unreasonable or otherwise unlawful for delivery of livestock to Hygrade's plant in the stockyards area.

A few years later, however, the big packers sought to avoid payment of the Yard Company's so-called yardage charge on all shipments received at the yard by compelling delivery of their direct shipments in the public streets adjoining the public yards. But due to their long participation in the stockyards business, both at Chicago and elsewhere, and their own vital part in the assessment of yardage charges and in the revenue thus derived, the Chicago packers have never made any direct at-

tack on the measure of the yardage charges in a proceeding before the Secretary of Agriculture, who has exclusive jurisdiction of those charges. They have preferred, instead, to ask delivery within the narrowly confined and congested stockyards area, but at points outside the public yards. In a case filed in an Illinois state court and removed to the Federal District Court, Armour proposed to evade the payment of the yardage charges by taking its livestock from the unloading pens into the public streets. The complaint was dismissed by the District Court and on appeal, this Court affirmed. *Armour & Co. v. Alton R. Co.*, 312 U. S. 195. In the meantime, Swift instituted a proceeding before the Commission, seeking an order which would enable it to obtain its direct shipments of livestock from the Yard Company's unloading pens and thence into the public streets without the payment of the yardage charges. The Commission found that the delivery of such livestock into the Yard Company's pens without affording free egress into the public streets was not an unreasonable practice, and dismissed the complaint. *Swift & Co. v. Alton R. Co.*, 238 I. C. C. 179. On appeal to this Court, the Commission's decision was affirmed, and after an extended consideration of the documents now embraced in exhibit 42 (R. 892, 1174-1638), the Court stated:

"The Commission finds that it was the attitude of the packers that their patronage was a thing of value to the Stock Yards, and they proposed to sell that patronage to the Yard Company. The Packers and Stockyards Act having made private arrangements of this kind unlawful, the packers now contend that the carriers must protect them against yardage charges on their direct shipments."

"It was the packers themselves who suppressed the competitive yards, and alternative facilities for unloading their stock." (316 U. S. 216 at 230)

It is interesting to note the fidelity with which history has made full circle. The facilities which Swift now proposes to construct for the receipt of its direct shipments of livestock would be located only a short distance from the Central Stock Yards which the packers constructed and then conveyed to the Yard Company in 1892 in their campaign to acquire an interest in the public yards.

This proceeding is the most recent attempt by the packers to retrace their steps and to be restored to the position they abandoned in 1892 in return for a share in the profits of the Yards Company. This they propose to accomplish at the expense of the carriers and all other interests in the stockyards area by obtaining a rate basis which would completely ignore the transportation services required to effect private track delivery to the Chicago packers within the stockyards area and which would, as Swift asserted in the *Hygrade* case, "absolutely demoralize transportation in or about the stock yards." (Appendix A, p. 48)

Livestock consigned to points in Chicago takes one of two bases of rates. Shipments moving to the Union Stock Yards, to Swift's so-called "Omaha plant" pens, or delivered at the public team tracks, all served by the line-haul carriers, take the line-haul rate. (R. 260, 375, 836) Livestock delivered by the Junction would take the line-haul rate plus a switching charge, which at the time of the hearing before the Commission was \$28.80 per car. This latter is the rate applicable to the private track delivery sought by Swift as well as such delivery to the other packers on the rails of the Junction but it is a rate basis which, except in some emergencies, has never been used. (R. 520, 838-40)

Under a trackage arrangement which has existed since 1865, and has, in effect, extended the rails of the trunk lines to the chutes and pens of the Union Stock Yards, livestock consigned to the Yards is placed at the Yards' unloading pens by the line-haul carriers which bring the stock to

Chicago. (R. 609, 635, 649-50, 839, 923) This traffic, averaging 76,920 cars per year for the five years preceding the hearing before the Commission, moves from the outer yards of the line-haul carriers directly to the public yards. (Ex. 28, R. 607, 1117, 609, 635, 677) The cars set at the unloading chutes by the line-haul crews are immediately unloaded, and the empties are then returned by the line-haul crews to their own property. (R. 609, 635, 677) The Junction does not in any manner participate in the transportation and delivery of this livestock. (R. 539) Of this total annual movement, 31,000 cars were consigned to the packers at the Union Stock Yards as so-called direct shipments. (Ex. 28, R. 607, 1117) None of that number were Swift's. For some years, Swift has been receiving all of its directs, averaging approximately 6,500 cars per year, at the facilities of its subsidiary, the Omaha Packing Company, located on the Burlington Railroad approximately  $2\frac{1}{2}$  miles from the public yards, and outside of the stockyards area. (R. 262, 266, Ex. 28, R. 607, 1117) Swift is the only large packer having unloading facilities located on the rails of a line-haul carrier in Chicago, and since the stock received there takes the flat Chicago rate, Swift has for many years secured delivery of its direct shipments on a basis which is not available to the other packers.

Swift's purpose here is to secure delivery of its directs within the stockyards area, in receiving pens which it proposes to construct near the public yard and within the area presently occupied by its Chicago plant. It is in this area, sometimes called "Packingtown", that the numerous buildings comprising Swift's Chicago plant, and the plants of thirteen other packers are located. (R. 272, 327, 540) These plants are served only by the Junction, and it is the Junction's applicable tariff charge for delivery of livestock to a plant facility in that area that Swift attacked in its complaint before the Commission in this

case and defended so vigorously and successfully in the *Hygrade* case. (R. 444-45, 838-40, Appendix A)

The stockyards proper and the contiguous Packingtown together constitute what is sometimes referred to as the "Mile Square." The entire area is bounded by Ashland Avenue on the west, Halsted Street on the east, Pershing Road (39th Street) on the north and 47th Street on the south. (R. 272) The public stockyards extend from Halsted Street on the east to a private way called Racine Avenue on the west, and from 39th Street on the north to 47th Street on the south. (Ex. 3, R. 1041) The stockyards and Packingtown together are sometimes referred to herein as "the stockyards area."

The flow of a great and continuous volume of raw materials and supplies essential to the operation of the industries in the stockyards area and vicinity and the outbound movement from those industries depends on the ability of the railroads serving the area to furnish efficient service. The funnel through which this tremendous tonnage must be moved is the Chicago Junction Railway.

The Chicago Junction Railway is a switching line which provides the sole connection between the lines of the line-haul carriers and 499 industries having 645 private sidings, most of which are in the stockyards area and its vicinity. (R. 443) These include Swift's present plant, the site of its proposed facilities, and the plants of 13 or more other packers. (R. 444-46, 467, 540) Within this crowded area the Junction annually handles hundreds of thousands of cars of dead freight, perishables and empties, moving to and from the hundreds of industries served by it, including all of the cars of dead freight consigned to the packing houses within the stockyards area and the empties and cars of packing house products removed therefrom. (R. 443-46, 465)

The sidings and chutes of the Union Stock Yards are the only facilities on the Junction which the line-haul carriers, by means of running rights, serve with their own crews and power. (R. 443, 839-40) Their running rights do not give them access to industry sites in Packingtown and it would be manifestly impractical for the Junction's 27 connecting roads to exercise such rights. (R. 527) It is to avoid such conflicting operations by many individual carriers that that terminal road exists.

The numerous packers in that area other than Swift receive their directs through the public yards by means of an extensive system of overhead viaducts owned and maintained by the Yard Company.<sup>1</sup> (R. 539, 983-84) All dead freight moving to and from the industries in the stockyards area is delivered to and received from the shippers by the Junction, and interchanged by the Junction with the line-haul carriers at the Junction's Ashland Avenue Yards. (R. 443, 462-63) This means, in short, that all livestock has been delivered and received in this area exclusively by the trunk lines without interchange, and all other freight moving to or from this area has been delivered and received by the Junction and interchanged by it with the line-haul carriers. It cannot be over-emphasized that the physical plant, and the entire operation, both of the Junction and the line-haul carriers, have been developed and geared to that method of handling from the beginning. In its extensive consideration of the transportation conditions which would attend the delivery sought by Swift and the services required to effect such delivery, the Commission stated:

"We have indicated generally the difficulties which would confront defendants if required to make delivery of livestock at complainant's plant, the basic difficulty

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<sup>1</sup> This method of delivery is equally available to Swift but is not presently being used by that packer.

being that such method of delivery is not adapted to defendant's service, track and yards, as specially designed and developed, along with the city's intensive development, for performance of the centralized delivery service rendered at Chicago. For some 70 years the method of conducting terminal operations in the stockyards district has been for the line-haul carriers, using Junction tracks, to carry all shipments of livestock to the stockyards and make deliveries there, and for the Junction to perform the switching and spotting of other freight for the packers and many other industries in the area. As a result, the Junction's main-tracks, its yards and subyards and their tracks, are peculiarly designed and fitted for the operations and service described, and any change, particularly as contemplating deliveries of livestock to the plants of the packers, would, as might be expected and as is shown, require a conflicting use of such yards and tracks and subject defendant's operations to interference and delays." (R. 72)

This "basic difficulty" arises out of the physical conditions that Swift and the other Chicago packers created by their historic choice to receive all livestock at the public yards and to participate in the profits of that business. These proceedings by the large Chicago packers, of which this is the third, are the results of the packers being required to divest themselves of their interest in the stockyards business. They would now ignore the fact that by reason of their illegal participation in that business and their insistence for many years that livestock be delivered in this area only at the public yards the physical development of the area has been such as to preclude the service they now demand.

In its brief before the Commission in the *Hygrade* case.

Swift opposing what it now seeks, strongly emphasized the nature and effects of this development, as follows:

"This is the point where probably the greatest live stock market in the world is located. Necessarily any system of transportation which has been evolved for the handling of live stock into and out of a market such as the Chicago live stock market, including the packing companies which are adjacent to and form a part of said market, must be so constructed as to furnish the type of service demanded by probably the most perishable type of traffic handled by the railroads. The record shows that the present system of receiving at the unloading docks of the Union Stock Yards & Transit Company all live stock consigned to either commission men or packers located in or adjacent to said stock yards, has been in existence since 1865 (T. 249)." (Appendix A, p. 35)

"The entire transportation system in and about the stock yards and adjacent packing plants has been constructed on the basis of delivering all live stock direct to the unloading chutes of the Union Stock Yards & Transit Company. According to the testimony in this case, any other method of handling would absolutely demoralize transportation in or about the stock yards." (Appendix A, p. 48)

"Another reason why the circumstances and conditions surrounding the transportation service being rendered to, or requested by, complainant, and that being rendered to intervener [are dissimilar], is because the absorption of switching charges<sup>1</sup> in the stock

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<sup>1</sup> Swift asked for joint rates while the Hygrade Company sought to compel the absorption of the Junction's switching charge. Both, however, sought private track delivery without the assessment of the switching charge. This is the basis of the charges applicable to Swift's Omaha plant pens and the Union Stock Yards. In its discussion of the *Hygrade* case, the Commission stated:

"It was there sought, as in the instant proceeding, to have certain private tracks used for the receipt of livestock without any additional charge for switching." (R. 77)

yards district on live stock would completely demoralize the present system of handling live stock. As indicated above, the present method of handling live stock in the stock yards has been in force since 1865. All of the railroad facilities in and about the stock yards have been constructed to conform with the practice of delivering all incoming live stock direct to the loading and unloading chutes of the Union Stock Yards & Transit Company." (Appendix A, pp. 48-49)

## SUMMARY OF ARGUMENT.

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The primary propositions upon which the railroad interveners rely are as follows:

I. The Commission's findings are adequately supported by substantial evidence of record.

II. The Commission's findings are in accord with the applicable and governing principles of law and fully support its order of dismissal.

Swift's complaint before the Commission was, in substance, an attack upon the published charges for delivery of livestock to its private track in the stockyards area. The applicable charges were said to be unreasonable and unduly prejudicial. Swift asked that the Commission prescribe joint rates and charges which would not exceed the line-haul rates on livestock to Chicago. In effect, therefore, Swift sought an order which would reduce the published rates by the total amount of the Junction's switching charge for the private track delivery of livestock to the Chicago packers. (R. 50-56) Having thus invoked the Commission's rate jurisdiction, Swift's appeal therefrom is necessarily governed by the well established rule that the Commission's informed judgment in such matters will not be disturbed except for pervading errors of law or a lack of substantial evidence to support its necessary findings. *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541; *Skinner & E. Corp. v. United States*, 249 U. S. 557; *Swift & Co. v. United States*, 316 U. S. 216; *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503; *Ayrshire Corp. v. United States*, 335 U. S. 573.

In the argument which follows, we shall show that the Commission painstakingly considered each of the issues

raised by Swift's complaint, and that, in its disposition of those issues, it applied the principles of law that have been repeatedly announced and approved by this Court. We shall show that the Commission's findings conform to those governing principles, and that each of those findings is sustained and abundantly supported by the evidence of record.

## ARGUMENT.

### Foreword.

Although the nominal complainant is Swift & Company, the Commission recognized that there are thirteen or more other packers (R. 272, 327) whose plants are located in the same area, who are in competition with Swift and who would be entitled to the same privilege of plant delivery at the line-haul rates. The Act would not sanction granting special rates and services to Swift alone.

In a previous case<sup>1</sup> in which it sought delivery in the public streets within the stockyards area, Swift was nominally the sole complainant as here, but the Commission, recognizing the true scope of the issue before it, considered not merely the traffic of Swift but the volume of direct shipments of all of the Chicago packers. This Court, sustaining the conclusion of the Commission, quoted from the latter's report as follows:

"The Commission found that the direct shipments of livestock transported by rail to the packers at Chicago have exceeded 30,000 carloads annually for several years." (316 U. S. 216 at 226) .

"The Commission has found that 'the evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago.' " (316 U. S. 216 at 227)

<sup>1</sup> *Swift & Co. v. Alton R. R. Co.*, 238 I. C. C. 179; *Swift & Co. v. United States*, 316 U. S. 216.

Also, in *Hygrade Food Products Corporation v. Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, in which it upheld the same switching charge involved here, the Commission recognized as Swift insisted, that it must consider the total of the direct shipments received by all of the Chicago packers. Swift, in opposing plant-door delivery of livestock to its competitor, earnestly argued, on brief before the Commission, that it would be error to proceed otherwise, stating as follows:

"In this connection the complainant [the Hygrade Company] may state that its business is so small as to make no particular effect upon the method of handling livestock into the Chicago live stock market. It is doubtful if this is true, but even if it were, that is not the question which is here before the Commission. As we shall indicate in point 6 which will follow, there are many other packers receiving live stock direct under identical circumstances applicable to complainant and if complainant finds it of advantage to receive this livestock direct at its plant, and it has stated it intends to do so in the event the carriers absorb the switching charges, there will be many other larger packers who will demand the same thing." (Appendix A, p. 36)

"The Commission should not confine itself to the consideration of complainant alone but must also consider the other shippers engaged in like business and located in relatively the same position as complainant." (Appendix A, p. 49)

Point 6 of its brief in that case was then devoted by Swift to an extensive argument, designed to show that the relief asked by the Hygrade Company would "completely demoralize the present system of handling live stock". (Appendix A, pp. 48-52) The Court will note that this argument was predicated on Swift's assertion that "if receipt of livestock direct to the packing plant of complainant is of

advantage to it, it will be of advantage to every one of its competitors. They will all have to have the same service (T. 270)." (Appendix A, p. 50) It is now argued that that identical procedure by the Commission in this case constitutes one of the major issues before the Court, (Statement As To Jurisdiction, pp. 4, 14-15) and that consideration of the basis which Swift rightly insisted was so proper and necessary in the determination of the complaint of Swift's competitor creates a serious error here. (Brief, pp. 95-99) It is informative to compare the quoted statements from Swift's brief in the *Hygrade* case showing the vital interest of all packers in plant-door delivery with the reiterated statements in the brief in the case at bar, that "Swift still stands alone". (Brief, pp. 31-32, 95-99) In view of the facts so forcefully stated by Swift in opposing Hygrade's request, it is evident that "Swift stands alone" here only nominally and purely for tactical reasons. As Swift previously insisted, all the packers would demand like service on their direct shipments. They have not participated in this proceeding simply to assist Swift in making the argument that the case should be treated as though it involved a special arrangement available to Swift alone.

In response to Swift's position that the requirements of Section 3 should be disregarded in this case, and that the matter must be viewed without regard to the rights of the other packers to obtain the same advantages that might be accorded to Swift, the Commission stated:

"Complainant does not dispute, but instead concedes, that the other packers, if providing the necessary facilities therefor, would be entitled to the same delivery service at the same rates as accorded it. What it urges is that the carriers' contention as to additional burdening and disruption of their operations because of demands for the service from other

packers rests on an untested assumption or conjecture, and would thus require us to decide the case, not upon facts, but upon prediction, opinion, and prophecy.

"But the very nature of complainant's complaint, asking as it does, that the defendants be required to render for its proposed plant a delivery service of a kind new to the stockyards district, necessarily requires exercise of judgment as to future effects and results. The record contains ample facts showing that, if complainant's demand for the service without charge in addition to the line-haul rates were granted, the other packers would be under considerable, if not great, competitive compulsion to provide the necessary facilities enabling them to make like demands. We may take account of, and give effect to such conditions without being definitely apprised as to what each and all of the other packers will do, or will find it financially profitable and otherwise advantageous to do." (R. 75-76)

The Commission thus recognized and dealt with the realities of the situation, and this is objected to by Swift only because it makes clear the true nature of its complaint and the effect of what is proposed, on the carriers, the public and other shippers.

**1. THE COMMISSION'S FINDINGS ARE ADEQUATELY SUPPORTED BY SUBSTANTIAL EVIDENCE OF RECORD.**

The Commission's order dismissing Swift's complaint is based upon findings which dispose of every issue raised by Swift in this proceeding. In response to Swift's contention that the carriers should be required to deliver livestock to Swift's private tracks in the stockyards area at the flat line-haul rates, the Commission found that those rates, previously prescribed by it, were not designed or intended to compensate the carriers for the livestock deliv-

ery service sought by Swift, and that, considering the transportation services required for such delivery and all of the attending facts and circumstances, the published switching charge of the Junction in addition to the line-haul rates was not unreasonable or otherwise unlawful for deliveries of livestock to Swift's private tracks. (R. 78-81) The Commission found that Swift's claim of prejudice to livestock as a commodity because of the different charges applicable to delivery of livestock to Swift's private track as contrasted with deliveries of dead freight thereto was without merit because "the measure of transportation services rendered shipments of live animals is substantially greater than that accorded dead freight." (R. 65) Swift's claim that the published charges were prejudicial to it and preferential of its competitors at certain points named in the complaint was similarly disposed of by a finding that there was no showing "that services as desired will result in a situation similar to that at a point or points alleged to be preferred." (R. 70) The Commission also found that the transportation services, conditions, and circumstances required to make delivery at the Omaha plant pens and at the Union Stock Yards were substantially dissimilar from those involved in making delivery at Swift's private tracks in the stockyards area. (R. 78) In its consideration of Swift's request that joint rates, not in excess of the line-haul rates, be established for delivery of livestock to its private track the Commission determined that the establishment of such rates would not be necessary or desirable in the public interest. (R. 77, 81)

The District Court noted each of the findings referred to above and concluded that the Commission's findings were supported by substantial evidence. (Conclusion of Law No. 1, R. 209) In the discussion which follows, we shall endeavor to show that the District Court's determination is unassailable.

**A. It Is Established on This Record That Delivery of Livestock to Swift's Private Tracks in the Stockyards Area Would Be an Impractical and Costly Operation Which Would Adversely Affect All Other Interests in That Area.**

At the time that Swift and Armour sought to compel the carriers to effect what this Court characterized as "a readjustment of their rate schedules" on direct shipments of livestock to Chicago (*Armour & Co. v. Alton R. Co.*, 312 U. S. 195 at 201), the considerations which must govern the Commission's action were clearly delineated. The Court, affirming the Commission's decision in the companion case, stated that the question presented "was to be decided by the Commission upon the facts of each particular case, and not by mechanical application of a fixed rule of law as contended by appellants" (316 U. S. 216 at 225) and that "the Commission was justified in considering, as it did, all that would account for the evolution of the practice complained of as well as the effect of existing and proposed practices on the interests of the carriers, the public, and other shippers. *Adams v. Mills*, *supra*, at 409 *et seq.*; *Atchison, T. & S. F. Ry. Co. v. United States*, 295 U. S. at 198, *et seq.*; *Armour and Co. v. Alton R. Co.*, *supra* at 201. Neither the railroads nor the Stock Yards exist for the benefit of the packers alone. Their patronage is large and important, but neither in the regulation of the carriers nor in the regulation of the Stock Yards are they entitled to facilities or treatment that will ignore the existence of other interests." (316 U. S. 216 at 225-26)

Similarly in this proceeding, the packers seek a readjustment of the published charges applicable to livestock and, in its consideration of the present complaint, the Commission stated:

"In the determination of the issues raised in this

proceeding, it is necessary to consider the track layout of the Junction, and the present operations thereover in the handling of so-called dead freight, which term includes perishable and all other freight other than livestock; the method by which livestock has for many years been handled by the line-haul carriers to the Union Stock Yards; the physical operations that would be necessary if the Junction were required to make private-track delivery of livestock, as sought by the complainant; and also, in order to avoid undue preference and prejudice, if it were required to make similar deliveries to complainant's competitors." (R. 60)

"All facts relating to the existing custom and practice of making deliveries of livestock and also facts and circumstances leading up to that custom and practice, as well as the effect of the proposed practice on the interests of the carriers, the public, and other shippers, are relevant." (R. 71)

It is thus obvious that the Commission's decision closely adhered to and applied the principles previously enunciated by this Court. We shall show that the evidence before the Commission, considered in the light of these principles, required its dismissal of Swift's complaint.

Before discussing the evidence in detail, it may be of convenience to the Court if a brief and concise statement is made outlining (1) the present method of delivering livestock in Chicago and, (2) in contrast, the method of delivery which would be required under Swift's proposal.

1. The evidence shows that under the present method of delivery, after trains carrying both livestock and dead freight have entered the Chicago yards of the line-haul carriers, the stock is separated from the dead freight and then moved directly to the chutes of the Union Stock

Yards by the crews and engines of the line-haul carriers.<sup>1</sup> To reach the chutes these carriers have trackage rights over the rails of the Chicago Junction Railway on whose line the chutes of the stock yards are located.

In a large number of instances, stock arriving at Chicago on one train is held up pending the arrival of more stock in order that a consolidated run may be made to the chutes, thereby saving extra runs and avoiding added costs and increased difficulties in the crowded stockyards area. Only about 37 per cent of the trains handling stock to the chutes also carry dead freight for industries on the Junction which must be interchanged with the Junction at its Ashland Avenue Yard *before* the stock is delivered at the chutes. Immediately upon unloading the stock at the chutes, the line-haul crew and engine returns with the empty stock cars to its own yard.

It will be shown that rail operation in the stockyards area is today heavily congested, due primarily to the enormous growth of industry in that area. As a consequence, the delivery of dead freight, and livestock has pushed the rail facilities to capacity with the result that there is only a narrow margin between efficient service and great delay and injury to all shippers served in this area. The most graphic evidence of this may be found in the fact that it now takes the Junction an average of nearly 32 hours to classify and deliver ordinary freight through the Ashland Avenue Yards now unburdened with livestock.

2. In contrast to the present method of delivering livestock the evidence shows that under the proposed method nearly one-half of the annual volume of stock now going to the public yards would have to be segregated and de-

<sup>1</sup> Since record references are supplied with the more complete discussion of the evidence which follows, they are omitted in this summary statement.

livered to the various packing plants on the rails of the Junction. This would require that when stock comes into the yards of the line-haul carriers two separations would have to be made, one of the stock which would still go to the public yards, one of the packers' stock consigned to the private sidings. All trains carrying stock to the chutes at the public yards would include direct shipments consigned to private sidings of packers. The livestock consigned to private sidings would have to be interchanged with the Junction at Ashland Avenue, and the Junction would have to make delivery of this stock after separating it from dead freight and classifying it in the Ashland Avenue Yards according to consignee. This operation would also require the Junction to return the empty stock cars to the Ashland Avenue Yards, classify them according to the line-haul carrier which would receive them and then interchange them with the line-haul carriers.

The evidence shows clearly that difficulties of such consequence as to cause a breakdown of terminal operations in this area would result from the attempt to carry out the proposed operation. Even under present conditions, the consolidated trains, constituting 37 per cent of those carrying livestock to the public yards, cause a piling up of as many as four trains at a time on the running track to the public stock yard while dead freight is interchanged with the Junction. When this percentage is increased to 100, as it would be under the proposed operation, use of the Junction's main running track for deliveries of livestock to the Union Stock Yards would be a practical impossibility. The attempt to interchange highly perishable livestock with the Junction in a yard that has no receiving or classification tracks available for that purpose and no room in which to expand, the impossible operation that the Junction would have to undertake in its efforts to receive and classify this livestock in a yard already saturated with dead freight,

the fact that this livestock on short time would be buried behind dead freight which now takes over 31 hours for delivery from the time of its receipt by the Junction, and the necessity of digging out the livestock for preferred treatment, at the sacrifice of all other traffic, all demonstrate the unfairness and extremely impractical nature of Swift's proposal. Swift's proposal would revolutionize the entire switching operation in those yards for another reason. The intermingling of livestock and dead freight on the same receiving and classification tracks would require that all freight, both the livestock and dead freight, be shoved to rest and not "kicked" in the customary and time-saving manner and freight would be arriving at the yards faster than it could be handled. The thousands of empty stock cars, none of which are handled at present by the Junction, would have to be collected by that carrier from the packers' private sidetracks and returned to its Ashland Avenue Yards for transfer to the line-haul carriers. In short, the evidence shows that the proposed private track delivery of livestock to the packers in the stockyards area would require services and entail operating difficulties of an insuperable character.

The evidence also shows that Swift's proposal would gravely impair the rail transportation service required by other shippers in this area. It would be practically impossible for the line-haul carriers to continue to deliver the producers' livestock to the public yards. The main running track which must be used by the line-haul carriers for that purpose would be blocked while the packers stock and the dead freight carried on consolidated trains was being interchanged with the Junction in its Ashland Avenue Yards. These trains would not be able to interchange all of that tremendously increased volume of freight with the Junction while that switching line was using its lead tracks to work the livestock through its re-

ceiving and classification facilities with the result that numerous trains would pile up on the main running track waiting for an opportunity to interchange traffic with the Junction. That main running track would also be blocked while the Junction switched the empty stock cars from the packers private tracks to its yards for return to the line-haul carriers. At a time when such cars are in especially short supply, their return for use by the shippers would be delayed at least two days. The evidence also shows that the Junction cannot maintain its present dead freight service to the 499 industries served solely by it if it must also handle livestock for the packers and that those industries would be denied their sole source of rail transportation. This, then, would be the effect of the proposed practice on the interests of "the public and other shippers".

The evidence also shows that the rate basis which Swift demands for private track delivery of livestock in the stockyards area was not constructed or designed for the difficult and impractical service which it now seeks, and that, on the basis of uncontradicted cost studies, the terminal allowance included in that rate basis would be wholly inadequate for the proposed service.

### 1. THE PRESENT OPERATION.

- a. **The Ashland Avenue Yards of the Chicago Junction Railway Are the Bottleneck in Which All Freight Destined to Industries on the Junction Must Be Interchanged and Through Which All Livestock Going to the Stockyards Must Pass.**

A vital, governing factor of the rail operation in this great industrial area is the physical layout and the operation of the Ashland Avenue Yards of the Chicago Junction Railway. Into those yards each working day pour hundreds

of cars of dead freight destined to the many industries in the area. The twenty-seven trunk lines and switching carriers that connect with the Junction must interchange, within the confines of that yard, *all* cars of dead freight consigned to the hundreds of industries on the Junction. (R. 436, 443, 539) In this yard the Junction also delivers to the line-haul carriers the great bulk of the loads and empties going out of this industrial area. (R. 464-65)<sup>1</sup> It is in such a yard, already saturated with traffic, but which has never handled a car of livestock except in an emergency, that Swift proposed that the carriers should be required to interchange, classify and deliver all of the thousands of cars of livestock which are consigned directly to the packers. An appreciation of the operating conditions and physical layout in and around Ashland Avenue is thus essential to an understanding of the grossly extreme character of this proposal, and the soundness of the decisions below.

The Ashland Avenue Yards, which are shown on the aerial photograph attached to this brief as Appendix B (Ex. 19, R. 553, 1104), are bounded by 43rd Street on the south, Pershing Road on the north, Western Avenue on the west, and Ashland Avenue on the east. (Ex. 14, R. 472, 1092)

Although this collection of tracks might be deemed to constitute one yard, for purposes of identification and operating convenience one group of tracks is referred to as the "north yard", another as the "south yard" and a third as "The Damen Yard." (R. 460-61) All are sometimes referred to as the Ashland Avenue Yards. The so-called North Yard and South Yard are separated by the main running tracks which are indicated by arrows on the

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<sup>1</sup> Outbound traffic to be delivered to southern and eastern carriers is interchanged by the Junction at its Loomis Street yard at 47th and Loomis. This yard has only 20 tracks available for classification. (R. 464-65)

attached photograph. (R. 458-61, Ex. 14, R. 472, 1092) There are three of these main running tracks by means of which trains may pass through and move to and from the Ashland Avenue Yards. Only one of these tracks, numbered 1103 but sometimes referred to as track 3, is available and used for all *eastbound* traffic, moving from the left hand side of the photograph through to the right hand side and beyond. (R. 459, 486-87) This track is the sole means of ingress for those line-haul carriers which enter the area served by the Chicago Junction from the west. (R. 486-87) All livestock delivered to the stockyards by the principal carriers of livestock, with the exception of the Rock Island, must move through Ashland Avenue on this one track, and it is emphasized here, in the light of the evidence to be discussed later, that any blocking of this track shuts off access to the public stockyards. (R. 487-89) Immediately north and south of this track are the two other main running tracks which are used exclusively for *west-bound movements*. (R. 459) About twelve line-haul carriers use these tracks to effect deliveries of dead freight and perishables to the Junction, and nearly all the empty stock cars returning from the stockyards must use these two tracks. (R. 636, 474) These same carriers also use these tracks as a passage through the Ashland Avenue Yards to other yards west and north of this area, and the same tracks are used by the Junction in effecting return of empties from private sidings, and in bringing loads from industries on its line for interchange with line-haul carriers. (R. 478, 637)

Immediately adjacent to the most northerly of these three main running tracks, there are 24 tracks known as the Ashland Avenue North Yard. (R. 522) These tracks are used exclusively for traffic, loads and empties, outbound from industries on the Junction. (R. 464) Only the first three tracks just north of the main running tracks, however,

are available for receiving cars. (R. 459-60) On these three tracks all the loaded and empty cars moving outbound are placed by Junction crews in whatever order they may be received. These cars must then be separated by a Junction crew according to the line-haul carrier which will pick them up. This operation is performed by switch engines moving up and down the lead track and pushing the cars from one of the three receiving tracks to the 20 classification tracks at the northernmost (or top) part of the Ashland Avenue Yards. (R. 465-66)

Immediately south of the three main running tracks which bisect the area are 33 tracks known as the South Yard. (R. 458-59) Here all freight destined to industries on the tracks of the Junction must be placed by line-haul carriers, whether they enter the yards from the east or west. (R. 463) Here, again, only a few of these tracks can be used for receiving inbound freight. The first nine tracks south of the main running tracks are all the available receiving tracks. *All freight destined to the 499 industries located on the Junction must funnel through these nine tracks.* (R. 463, 527, 538-39) It is on these nine tracks that all livestock going directly to any packing plant would have to be interchanged if space were available for that purpose, as in fact it is not. (R. 539, 547, 563) As in the Ashland Avenue North Yard, a Junction switch engine works up and down a single lead track transferring cars from the nine receiving tracks to the 24 classification tracks according to the destination of the particular car. (R. 466, 539) This is the same lead track that the Junction's connecting roads must use to reach the nine receiving tracks. (R. 546, 659)

Immediately south of the southernmost track in the Ashland Avenue South Yard (track 1033 on exhibit 14, R. 472, 1092) are fifteen additional tracks. This group of

tracks, known as the Damen Avenue Yard, is used for temporary storage of cars. (R. 460)

The Ashland Avenue Yards are hemmed in by the solid growth of industry on all sides. (R. 454, 467) Immediately to the north are government and private warehouses on property owned by the Central Manufacturing District. In the southwest corner is property of Wilson & Company whose plant immediately abuts the southeastern portion of the tracks. Immediately to the northwest is municipal property. (R. 445, 541)

Traffic moving from the west out of or through this Ashland Avenue Yard, and traffic moving from the east to or through the yard must pass through the bottleneck at Ashland Avenue. (R. 450) Immediately at the viaduct over Ashland Avenue there are seven tracks. These seven converge into four a few hundred feet east of the crossing. (R. 450-51) These four consist of the three main running tracks (one eastbound, two westbound) and one auxiliary track which runs only as far east as Packers Avenue, the first north-south street east of the proposed Swift facility. (R. 450-51, 549-51)

The Ashland Avenue Yards are not only the key to efficient railroad operation in the stockyards area, but are the focal point of no less complicated operations by the Junction in the entire area served by it. (R. 467) Once cars destined to industries on the Junction have been classified in the Ashland Avenue South Yard, they must be moved to base yards in the various operating districts. (R. 465-66) Before this movement can be made the inspection and other work necessary to the effectuation of the interchange must be performed in the Ashland Avenue South Yard. (R. 465-66) At the base yards the cars are reclassified for handling to the various consignees. For example, at the Halsted Street Yard, in Zone 4, ten further sep-

arations are made. (R. 466) Traffic moving out from industries on the Junction is removed from one of the industrial sidings or one of the team tracks in the area to one of the sub-classification yards, and is then returned to the Ashland Avenue Yard or to the Loomis Street Yard. (R. 464-66) It is not disputed that these Ashland Avenue Yards and the area they serve involve the busiest, most congested rail operation in the Chicago area. (R. 467, 701, 925) Faced with tremendous difficulties the Junction Railroad must and does operate this property with maximum efficiency and a minimum of delay. But it is of utmost significance in this case that the only type of rail operation the Junction has never regularly performed, in the many years of its operation, is the switching, handling and delivery of livestock. For over eighty years this job has been done exclusively by the line-haul carriers. (R. 469, 493)

**b. The Present Method of Delivering Livestock to the Union Stock Yards Has Developed Through Generations and the Custom and Practice Which Has Resulted Is an Efficient and Carefully Organized Operation.**

For the five years 1943-47, the years preceding immediately the making of the record in this proceeding, the average annual movement of livestock to the Union Stock Yards was 76,920 cars. (Ex. 28, R. 607, 1117) This means that more than 150,000 cars, loaded and empty, were handled annually by the line-haul carriers over the Junction running tracks to the public yard. None of that number was Swift's. For some years Swift has been receiving all of its directs, averaging approximately 6,500 cars a year, at the facilities of its subsidiary, the Omaha Packing Company, located on the Burlington Railroad approximately two and one-half miles from the public yard and outside the stock-yards area. (R. 262, 266, Ex. 28, R. 607, 1117) From its pens at that site it transports the livestock into the stock-

yards area by truck. (R. 266) Swift is the only large packer having a plant located on the rails of a line-haul carrier in Chicago and, since the stock received there takes the flat Chicago rate, Swift secures delivery of its direct shipments on a basis which is not available to the packers who must transport their stock into the stockyards area by rail. (R. 483)

With certain minor variations as between the several roads, the handling of livestock by line-haul carriers into Chicago follows a uniform custom and usage constructed out of generations of experience. Stock from outlying points moves into the outer yards of the line-haul carriers in the Chicago area on trains which also carry dead freight and perishables. There cars of livestock and dead freight are separated and the livestock is collected for delivery to the chutes of the stockyards. (R. 609, 635, 650, 677, 692) If there is sufficient time within which to make the market within the detention period permitted by the Federal statute, livestock coming into the yards of the line-haul carriers on one train is frequently held at these yards for brief periods, for consolidation with livestock arriving on another train. In this way it is possible to have one crew and one engine perform a service which otherwise would require two or more runs to the chutes of the stockyards. (R. 631, 650, 677)

In the run from the outer yards to the chutes at the stockyards most of the stock must pass over the sole east-bound running track which lies between the "North" and "South" Ashland Avenue Yards. (R. 486) Of all the western railroads, which are the principal carriers of livestock to Chicago, only the Rock Island approaches the chutes from the east. (R. 547, 649)<sup>1</sup>

<sup>1</sup> As pointed out at pages 43-44 of this brief, even the trains coming into the stockyards from the east now encounter difficulties because of crowded conditions extending two miles west at Ashland Avenue.

Under the existing practice the majority of the trains or cuts carrying livestock to the chutes do not carry freight to be interchanged with the Junction at Ashland Avenue. This is an important fact in measuring the consequences of Swift's proposal. Superintendent Kinsella of the Junction stated that during a test period from December 1 to December 7, 1947, 63 per cent of the trains carrying livestock to the chutes from the line-haul yards did not carry any other type of freight but made the run directly through to the chutes without stopping to interchange other freight with the Junction at Ashland Avenue. (R. 485, 543) This is typical as shown by the experience of the individual roads during other periods. During the month of December, 1947, the North Western ran 123 trains to the public chutes. Of these, 90 moved directly to the chutes without making setouts of dead freight into the Ashland Avenue Yards. (R. 956)

From April 16 to May 10, 1947, the Burlington ran 89 trains with livestock to the unloading chutes. Of these, 53 trains, or 59 per cent, made the run without making setouts of dead freight at Ashland Avenue. (R. 611-12) During the period April 15 to May 15, 1947, the Santa Fe made 74 trips to the chutes with livestock, of which 47 trips or approximately 60 per cent were direct runs to the stockyards without setouts at Ashland Avenue.<sup>1</sup> (R. 694)

When a train is made up in the outer yard consisting of livestock consigned to the stockyards and dead freight for delivery to the Junction, the dead freight is placed im-

<sup>1</sup> The test period from approximately the middle of April, 1947, to the middle of May, 1947, was selected because Swift's exhibit 16 (R. 534, 1095-1101) might otherwise appear to suggest that the majority of engines carrying livestock to the stockyards during this period made set-outs of dead freight at the Ashland Avenue Yard. As the record shows this Swift exhibit is a small selected list of trains and was furnished by the carriers upon the request of Swift for the consist of those specific trains only. (R. 532)

mediately behind the engine. (R. 487) Proceeding east over the east-bound running track the train pulls clear through to the east end of the Ashland Yard. (R. 486) The engine then cuts off the livestock and holding on to the dead freight backs down the lead track and kicks the dead freight and perishables into any available receiving track in the Ashland Avenue South Yard. Upon the completion of that operation it returns to the stock cars, couples onto them and proceeds to the chutes. (R. 487-88) During this entire period, while the crew is effecting the interchange of dead freight at Ashland Avenue, the cars of stock are standing on the main running track and are, of course, blocking any other movement through Ashland Avenue from the west on that sole running track. (R. 487-89)

On the other hand, the trains which contain only livestock move to the chutes without setting out loads at Ashland Avenue, and except for such interference as is encountered from trains engaged in setting out cars in the Ashland Avenue Yards, proceed straight through to the chutes. Immediately upon the unloading of the stock at the chutes the line-haul crew and engine returns with the empty cars to its own yard. (R. 469)

**c. Even Under Present, Long Established Procedure the Tremendous Growth of Industry in the Stockyards Area Has Brought Rail Operations to Full Capacity With Only a Narrow Margin Between the Present Efficient Operation and Disruption of the Entire Terminal Operation.**

The present method of delivery of stock directly to the chutes of the Union Stock Yards, developed through many years of experience, is a workable and reasonably efficient operation. Even under present conditions, however, the livestock encounters interference and operating difficulties

in its movement to the stockyards over the eastbound running track. This condition is greatly aggravated by the fact that the livestock as well as dead freight does not arrive in an even flow but is concentrated during the early morning hours of the first days of the week. (R. 468, 555, 561)

The very narrow margin which exists today between efficient operation and a breakdown in the terminal service in this area is attributable to the tremendous industrial growth in this district served by the Junction necessitating full capacity operation by that railroad.

Witnesses Kinsella and Sorenson of the Junction emphasized this fact, as follows:

“Q. Are your yards and facilities taxed to capacity at the present time?

“A. They are running bank full. We just have all we can do to master what we have to handle now.” (R. 484)

“As I stated before we are presently handling between 1,000 and 1,100 cars per day through this [Ashland Avenue] Yard, and the yard is being operated to capacity, and if the burden of handling this additional traffic was put upon us, *our yard operation would break down in its entirety.*” (R. 547, italics added)

The testimony of the operating witnesses of the line-haul carriers—all men with years of experience in and around the Chicago terminal area—fully demonstrates the critical nature of present operating conditions and the effect of Swift's proposal on the handling of stock and other freight.

Witness J. J. Stein, for 31 years with the Chicago North Western Railroad, nearly all of it in the Operating Department, and presently General Manager of that rail-

road, described the conditions now encountered in getting livestock to the chutes as follows:

"Train operation under present conditions in the Ashland Avenue area is seriously hampered because of inevitable congestion in this district. About 8 line-haul carriers enter Ashland Avenue from the west as does the North Western. About 12 other line-haul carriers come in from the east. Our experience shows that even under present conditions, our stock relief crews trying to get stock to the unloading chutes encounter serious delay at Ashland Avenue due to other line haul carriers attempting to enter this point and because of the activities of the C. J. cars and engines. A score of carriers—both line haul and terminal—attempting to operate in and through an area as congested as Ashland Avenue just cannot avoid conflict with one another in many ways.

"The result is that the run through Ashland Avenue to the Yards even today is not a rapid one which moves without interference. A large number of our stock trains going to the Yards today are stopped and must wait on the main running tracks because of the congestion." (R. 636)

Each of the other operating witnesses from the Burlington, Rock Island, Milwaukee and Santa Fe testified that his road was faced with similar operating difficulties and delays in moving cars of stock into the Ashland Avenue area because of the growth of the industries in this area, the consequent increased rail movement and the difficulty of effecting interchange of the dead freight in the Ashland Avenue Yards. (R. 624, 650-51, 677-78, 695-96, 701)

Witness Heide, Superintendent of the Rock Island, Chicago Division, and an operating man since 1905, stated:

"Right today the Rock Island is having all it can

do to meet its schedules on delivery of livestock to the Stockyards because of the delays and congestion in that area under present conditions." (R. 651)

The difficulties encountered by the Rock Island in making deliveries to the stockyards emphasizes the seriousness and extent of the operating problem in and around Ashland Avenue. That road, unlike most of the other principal carriers of stock, does not have to use the running track through the crowded Ashland Avenue Yards in order to reach the stockyards. (R. 649-50) It might thus appear that the Rock Island would not face the same operating problem. As stated by witness Heide:

"But that isn't the way it works. The congestion arises because of this bottleneck at the Ashland Avenue interchange, and it spreads out and backs up for quite a distance on both sides of that interchange. For example, the Rock Island in carrying stock to the Yards from the east enters Chicago Junction tracks at Root Street, which is about two miles due east of the Ashland Avenue Yards, and we frequently have to stop our trains and hold up stock at Root Street, even though we are two miles from the Ashland Avenue interchange, because of delays at Ashland Avenue. In other words, even though we do not have to pass through Ashland Avenue in order to reach the Yards, we are many times forced to hold up our stock trains because of delays in the Ashland Avenue area. We are not the only carrier using the Junction tracks from the east. The Illinois Central, the Wabash, the C. I. & L., Erie, Pennsylvania, N. Y. C. and Nickel Plate, and some other roads coming in from the east may be delayed and back us up. *It isn't an uncommon experience for a Rock Island engine to take seven hours from the time it enters the Junction tracks at Root*

*Street until it reaches the C. & N. W. Potato Terminal via Ashland Avenue. The potato terminal is four miles west and north of the Ashland Avenue Yards. Seven hours to run approximately six miles—that gives an idea of the operating problem we are facing in this Ashland Avenue area where Swift wants to create an additional burden.” (R. 651-52, italics added)*

The testimony of these practical operating men who have the direct responsibility of getting this stock to the market leaves no doubt that the interchange of direct shipments with the Junction for delivery by that road would convert a difficult operation into an impossible one. Witness Heide gave specific examples of just how close to capacity the rail movement is today.

Exhibit 38, introduced by witness Heide, consisted of foremen's trip reports on *all* Rock Island trains moving from the Burr Oak Yards of the Rock Island near Chicago to the chutes of the stockyards, Ashland Avenue, and to terminals just west and north of Ashland Avenue Yards between January 18 and 24, 1948. (R. 652, Ex. 38, R. 665, 1163-70) This exhibit shows the running time of each train which moved down to the stockyards and Ashland Avenue during this week. This exhibit shows that 60.6 per cent of these Rock Island trains during that week were delayed for one reason or another. (R. 655) On Sheet 1 of Exhibit 38, Engine 2100 is shown delayed at Root Street (the point just east of the stockyards' chutes where the Rock Island trains move onto Junction tracks). (R. 1163) Witness Heide testified as to this train:

“ . . . he was held at Root Street to enter the C. J. tracks as I mentioned here by reason of the backups of other trains in there and we cannot even get on

their tracks from 2:35 A. M. to 5:20 A. M. on January 18, 1948, waiting for permission to enter C. J. tracks on account of congestion." (R. 653)

On page 2 of Exhibit 38, Engine 2539 on January 18th left Burr Oak (14 miles from Ashland Avenue) at 6:25 P. M. (R. 654) It arrived at Ashland Avenue at 4:10 A. M., the following day. It was delayed from 7:30 P. M. to 10:15 P. M., at Packers Avenue (just east of the Ashland Avenue Yards). At 10:15 P. M. this engine moved to the west end of Ashland Avenue where it stood until 4:05 A. M., waiting to switch off the cars which were to be interchanged with the Junction at Ashland Avenue. (R. 654) Witness Heide testified that:

"\* \* \* the entire delay from 7:30 P. M. to 4:05 A. M. should be charged to the delay of not being able to get into the yard by reason of the other crews ahead of him that could not get into the yard." (R. 654)

Similar conditions are encountered by each of the other roads. The Santa Fe Corwith Yard at which it receives livestock is 3.75 miles from the chutes of the stockyards. (R. 694) If there should be relatively little difficulty, this run could be made through the Ashland Avenue Yard in 45 minutes. (R. 695) During a test period, November 1 to 7, 1947, inclusive, the Santa Fe made eight trips to the stock yards without having to stop at Ashland Avenue to interchange dead freight with the Junction. These trips took from 45 minutes to 4 hours (less than one mile an hour). (R. 694-96) On November 4th a Santa Fe train carrying only stock for the public chutes waited one hour and 45 minutes at the west end of the Ashland Avenue Yard and then consumed another hour and 45 minutes getting from the Ashland Avenue Yard to the chutes, a distance of about one mile when, as the operating witness stated,

without train interference "the move should be made in 10 to 15 minutes." (R. 695-96)

On November 5th, another Santa Fe crew trying to move direct to the public chutes consumed one hour and 20 minutes getting from Ashland Avenue to the chutes. This run consumed three hours and 10 minutes from Corwith Yard through the Ashland Avenue Yard to the chutes—a little better than one mile an hour. (R. 696)

On Santa Fe runs which required set-offs at the Ashland Avenue Yard the record is even more unfavorable. Witness Clousing of the Santa Fe testified as follows with respect to the operating problems caused by set-outs at Ashland Avenue:

"Even more delay is frequently encountered on runs where traffic for Ashland Avenue Yard is consolidated with traffic for the Stock Yards. For example, a consolidated run on November 1st to Ashland Avenue Yard and the chutes took our crew five hours and 30 minutes in all, four hours and 50 minutes of the time being spent in moving through the congested area between Corwith Yard and Ashland Avenue Yard. In other words, it took from 7:00 P. M. to 12:30 A. M. to move from Corwith Yard to the chutes, making set-out at Ashland Avenue Yard. *This check of running times was made only for the period November 1st to 7th, inclusive, 1947, and there are many more such cases.*" (R. 696, italics added)

The Commission described these conditions in its report, stating:

"Manifestly, as the line-haul carriers must use the same east-bound track into the Union Stock Yards, any delay to a train on that track results in 'piling up' trains of other lines seeking ingress to the Union Stock Yards. Frequently as many as four trains must wait

to enter this track as a result of its being blocked at the east end. Delays are necessarily experienced also because of 'set outs' made by consolidated trains, consisting of livestock and dead freight." (R. 63)

The difficulties and delay in making deliveries of livestock to the chutes due to crowded conditions in and around Ashland Avenue Yard have been getting steadily worse because of the growth of industry in this district. (R. 467; 501, 950) Traffic has increased enormously as the industrial area has developed but the Ashland Avenue Yard, closed in as it is by other structures, has no place in which to expand, and has become, year by year, a more serious bottleneck. (R. 523-24, 563, 925-26) The operating witness for the Burlington testified that a study of foremen's trip reports for a number of years shows that while in October, 1941, a round trip from the Burlington yards to the public chutes averaged slightly less than two hours, in October, 1947, on the same trip the average time had increased to four hours. (R. 624)

All of this testimony by experienced operating witnesses for the line-haul carriers was corroborated by the men who operate the Junction Railway—the crux of this entire operation. Witness Sorensen, Assistant Superintendent of the Junction, stated:

" \* \* \* on several occasions during the past three months just handling the traffic which we were handling during that time and not handling any direct shipments of livestock, we were forced to delay foreign line crews waiting to set cars out at the Ashland Avenue South Yard of the Chicago Junction Railway as high as nine and ten hours before they could effect delivery of cars to our line, this being due to our badly congested yard and unable to handle the cars quickly enough to avoid such delay." (R. 547)

The tremendous volume of traffic handled by the Junction in its Ashland Avenue Yards, averaging some 726,144 cars in recent years (R. 465), requires full and maximum use of the receiving and classification facilities in those yards. As stated by the Superintendent of the Junction, those yards are now "running bank full." (R. 484) The difficulties which inhere in this full capacity operation are aggravated by the fact that the necessary terminal functions performed by that carrier for its twenty-seven connecting lines involves the use of Junction tracks by 167 foreign line crews per day for an average per crew of 3 hours and 12 minutes. (R. 467) With respect to the yard in which all inbound freight is received, classified and sent to base yards for further classification and delivery, the Commission found:

"Having in mind the need for taking into account periods of peak movements and maximum use, the south yard appears to be used to capacity with no space for construction of additional tracks." (R. 73)

The vital significance of these operating conditions in and around the Ashland Avenue Yards may be fully appreciated when it is realized that it now requires a total of nearly 32 hours to deliver dead freight through these yards from the time that that traffic is interchanged with the Junction by the connecting carriers. (R. 471) This single fact forcefully demonstrates the extraordinary service which would be required in receiving, classifying and delivering livestock on short time through these yards and the destructive effect of that effort.

**2. THE ATTEMPT TO EFFECT DELIVERY OF LIVESTOCK TO THE PRIVATE SIDINGS OF THE PACKERS BY INTERCHANGE OF SUCH TRAFFIC IN THE ASHLAND AVENUE YARD WOULD BE A PHYSICAL AND PRACTICAL IMPOSSIBILITY BECAUSE OF THE OPERATING CONDITIONS WHICH WOULD RESULT IN THE YARDS OF THE LINE-HAUL CARRIERS AND THE ASHLAND AVENUE YARDS.**

Swift contends that the Commission should have required delivery of its directs on the siding at its proposed facility at the line-haul rate, the same rate which now applies to delivery at Swift's outlying Omaha plant pens and to the Union Stock Yards. This would mean that its directs, which have averaged 6,500 cars a year or 13,000 cars loaded and empty, would be added to the great volume of traffic handled by the Junction through the Ashland Avenue South Yard. (Ex. 28, R. 607, 1117) Moreover, the other packing companies would, of course, desire to place themselves on a competitive parity with Swift by providing similar yard facilities on their respective properties. As Swift stated to the Commission at the time that its small competitor, the Hygrade Company, attacked the Junction's switching charge for private track delivery of livestock, "if receipt of livestock direct to the packing plant of complainant is of advantage to it, it will be of advantage to every one of its competitors. They will all have to have the same service (T. 270)." (Appendix A, p. 50) This would mean that the direct shipments of all of the packers would be added to the volume of traffic handled by the Junction through its Ashland Avenue Yards. (R. 540-41) In the years 1943-47, an average of 31,000 cars of livestock or 62,000 cars loaded and empty were consigned to packers other than Swift, as so-called direct shipments. (Ex. 28, R. 607, 1117) The proposed operation must therefore be considered in terms of the effect on operations of a movement not only of the 13,000 Swift

cars but also in terms of a total movement of 75,000 cars through the Ashland Avenue switching yards.

The difficulties which necessarily attend terminal operations in the stockyards area would be multiplied and compounded by any attempt to perform the extraordinary service which Swift proposes. Indeed, while the witnesses attempted to visualize and describe the proposed operation it was their unanimous view that the inevitable result would be a complete breakdown of the rail transportation facilities in this heavily industrialized area. (R. 529-30, 547, 625-26, 636-37, 640, 644-45, 658-59, 683) The accuracy of this undisputed testimony may be fully appreciated by reference to the aerial photograph attached to this brief as Appendix B. That photograph accurately portrays the volume of traffic normally present in the Ashland Avenue Yards, except that the traffic shown in the North Yard is less than normal. (R. 550) Swift's proposal would place in those yards daily, a volume of livestock traffic, loads and empties, equivalent to a train two miles in length.

**a. The Service Which the Line-Haul Carriers Would Have to Accord the Packers' Livestock Under the Proposed Operations Would be Extremely Difficult and Costly.**

Starting with the operations which would be required in the outer yards of the line-haul carriers, the evidence shows that the proposed method of delivery would entail a vastly increased measure of service and operating difficulties of a serious nature. In the first place, private track delivery of livestock to the packers would involve a great deal of additional switching of livestock in the yards of the roads bringing stock to Chicago. (R. 620, 641, 656) This would result from the fact that the packers' stock which now goes to the Union Stock Yards would have to be interchanged with the Junction. It would thus be necessary to separate

all directs, amounting to almost 43 per cent of the total movement of livestock to Chicago, from the producers stock which would still be delivered at the chutes. (R. 622, 641, 656)

A train coming into a line-haul yard would have a number of cars of livestock as part of its consist, some of which would be consigned to private sidings. These cars would be mixed in with those still going to the public chutes. Each of the cars would have to be separated and reclassified into two groups before being hauled down to Ashland Avenue and the stockyards. (R. 620-23, 641, 656)

The operating men agreed that while *under ideal conditions*, this additional switch in their own yards would require at least one extra hour of time *per train* (R. 623-24, 641, 657, 700), the actual time consumed would probably be considerably greater because of an acute shortage of men and equipment to handle this additional work. (R. 656)

This additional segregation and classification of livestock in the yards of the line-haul carriers and the serious operating difficulties which would be encountered in attempting to interchange livestock with the Junction in the Ashland Avenue Yards would necessitate the operation of many more trains from the base yards of the line-haul carriers to the Ashland Avenue Yards and the Union Stock Yards. (R. 618-19, 624, 638, 679) This would be due to the inability of the line-haul carriers to consolidate the livestock for runs to the public yards to the extent that is now possible. Consolidation is possible only where there is sufficient time to hold cars pending the arrival in the line-haul yards of additional stock. (R. 638, 677) But because of the additional service which would have to be performed in the yards of the line-haul carriers and the serious operating difficulties which would be encountered

in the Ashland Avenue Yards, livestock could not be held for consolidation in the outer yards even for a few moments and many more runs would have to be made with one, two or three cars. (R. 631, 638, 679) Even under present conditions small cuts must sometimes be immediately run to the yard to avoid a violation of the Federal 28-hour law. (R. 631)

This point is forcefully illustrated by exhibit 41, introduced by witness Kiesele of the Milwaukee Road. (R. 687, 1173) That exhibit shows that during December, 1947, stock came *into* the Milwaukee yards on 168 trains permitting the operation of only 67 trains *from* the Milwaukee yards to the public chutes. (R. 679, 1173) But under the conditions which would inhere in the Swift proposal witness Kiesele stated:

"We would have been required to operate up to 168 trains under the plan proposed and certainly many in excess of the 67 trains actually operated through the numerous consolidations made under the present plan." (R. 679)

Witness Starbuck of the Burlington stated:

"The C. B. & Q. will be compelled as a result to make many additional runs in order to get stock to the C. J. and to U. S. Yards within the time limit, or much of the stock will have to be unloaded and fed at Clyde (C. B. & Q. Yards) before it can start for the stockyards. At Clyde, where the C. B. & Q. receives this stock there are feed and rest facilities for only fourteen cars of stock." (R. 619-20)

The witnesses from the North Western, the Rock Island, and the Santa Fe also testified that the proposed change would entail many additional runs to the Junction interchange and the stockyards. (R. 638, 663, 701-702)

Aside from the additional cost this would impose upon the railroads, it is obvious that the piling up of more engines and crews in the Ashland Avenue bottleneck would multiply the operating difficulties in that area.

The problems thus produced by the great increase in the number of engines and crews converging on the Ashland Avenue Yard would be compounded by the fact that, in contrast to today's operations, nearly every train carrying livestock to the stockyards would have to stop to make setouts at Ashland Avenue. Today, only about one-third of the trains carrying livestock to the public chutes stop to make setouts of dead freight at Ashland Avenue. (R. 485, 543) In contrast, the testimony shows, and it is obvious, that with almost 50 per cent of all the stock consigned to points on the Junction, practically every cut of cars would have stock to be set out at Ashland Avenue. (R. 488, 612, 663, 681, 696)

Swift so advised the Commission in its brief in the *Hygrade* case, stating:

"In practically every train of livestock coming into the stockyards there are cars consigned direct to packers (Tr. 280)." (Appendix A, p. 49)

The vital point about this is that every time a train stops to make a setout at Ashland Avenue it must leave the cars bound for the public chutes standing on the main running track and thus stop all other movements to the public yard. (R. 487-89) In the case of all traffic entering Ashland Avenue from the west, and this includes all the major carriers of livestock except the Rock Island, the only passage to the stockyards through this bottleneck is closed.

The Commission's finding with respect to this feature of the proposed operation is as follows:

"While, as above stated, any cars of livestock con-

signed to complainant could be handled in consolidated trains by grouping such cars at the head of the train with the cars of dead freight intended for set-out in the south yard, nevertheless, because of difficulties peculiar to livestock traffic, such handling would, it appears, affect adversely the line-haul carriers' operations in carrying livestock to the stockyards. As previously stated, all such traffic must move over east-bound track 1103 and, for that reason, any delay in unloading the stock tends to delay and 'pile up' other trains seeking ingress over the tracks to the stockyards. Consolidated trains always occasion some delay since the cars of livestock destined to the stockyards are left standing on the track while the engine hauls the cars of dead freight a short distance eastward and then, after backing them onto a sidetrack leading to the receiving tracks of the south yard, 'kicks' the cars as previously described." (R. 72)

**b. The "Services and Modification of Services Which Would Be Required For the Desired Deliveries" (R. 80) Would Cause a Collapse of Terminal Operations In the Junction's Ashland Avenue Yards.**

Although the operating difficulties which would confront the line-haul carriers in their efforts to interchange the packers' stock with the Junction in its Ashland Avenue Yards are substantial, the burdens which the Junction would have to assume are insurmountable.

As Swift pointed out in its brief in the *Hygrade* case, "the spotting and switching involved, and which the charge of the Chicago Junction would cover, is quite complicated and complex." (Appendix A, p. 39) The "considerable and detailed proof of operating conditions involved in a movement" to the Hygrade plant (Appendix A, p. 45)

was declared by Swift to show that such an operation "would be *very expensive, very difficult* and would undoubtedly affect the other perishable freight business of the Chicago Junction (T. 264)" (Appendix A, p. 47, italics added), and that the necessity of furnishing such service to all of the packers in the stockyards area "*would increase the difficulties of operation to the point of making such deliveries impossible.*" (Appendix A, p. 50, italics added) As the record here shows, these statements are equally true with respect to the identical service now sought by Swift.

The fact that this livestock would have to be interchanged with another carrier instead of being moved directly to its destination by the line-haul carrier would mean up to two hours of delay solely because of the additional mechanical and clerical work which would have to be done. (R. 539-40) Under the proposed method after receipt of the cars by the Junction, it would be necessary that they be given interchange inspection by the Junction's car inspectors as required by the Safety Appliance Act; the yard clerks would be required to check the trains, record seal protection, and apply side-carding in accordance with the data shown on the train consist; and the cars would have to be bled. (R. 539-40) Under the present method, none of this costly and time consuming procedure is necessary.

All of the large volume of livestock consigned to the packers would have to be received on the Junction's nine receiving tracks and classified on the 24 classification tracks in the South Yard. (R. 539) It is these same tracks that are now used for the receipt and classification of over 1,000 cars of dead freight per day, and as the evidence shows, the handling of that traffic requires maximum utilization of those facilities. (R. 484, 529-30, 547) As the Commission stated in its report:

"Having in mind the need for taking into account

periods of peak movements and maximum use, the south yard appears to be used to capacity with no space for construction of additional tracks." (R. 73)

In the process of placing this livestock on the Junction's receiving track and assuming that in some unknown manner space had been found for that purpose, the line-haul carriers would shove those cars only far enough to clear the switch point. (R. 494) Before another line-haul carrier could get its cars off the single main running track by which the public yard can be reached from the west, a Junction crew would have to shove the first cut of cars further down the receiving track. (R. 494-95, 660) The Junction would then have to separate the stock cars from the dead freight, switch the cars onto its overcrowded classification tracks and there classify the cars according to consignee. (R. 469-70, 495, 544-45) In other words, stock for Swift, for example, would be segregated from that going to the other packers. (R. 492-93) This segregation is always the job of the receiving carrier in any interchange of freight. (R. 492-93) After this separation, the livestock would have to be moved to an appropriate base yard and held there until moved to the packers' private tracks. (R. 469-70)

Since the packers' livestock would have to be received and classified on the same tracks that are now utilized to capacity by dead freight, the inevitable result would be that that livestock would be intermingled with and buried behind dead freight that now requires nearly 32 hours from the time it is received by the Junction in its Ashland Avenue Yards and delivered to the consignee. (R. 495, 545-46, 659) This is in excess of the total elapsed time that livestock may be confined in cars from its origin in the country without unloading for feed, water and rest. It is thus obvious that livestock could not wait its turn for de-

livery by the Junction as does the dead freight, but would instead require a degree of expedited service that is beyond the capacity of that terminal line.

The livestock blocked in between cars of dead freight which arrives in a continuous stream would have to be "dug out" and given preferred handling in every respect. (R. 496, 497-500, 544-46) It would be necessary to make special runs to the packers' private tracks in this extremely congested area in order that this livestock which invariably reaches Chicago on short time could be unloaded before expiration of the statutory confinement time. (R. 496, 544-46) It is indisputable that the attempt to render this preferred service to the packers' livestock would disrupt the classification and delivery of the dead freight now handled in that yards. (R. 529-30, 538, 546) Witness Sorenson described that necessary consequence of the proposed operation, stating:

"It would so seriously hamper our switching operations that in my opinion as an operating man, we could not keep our yard open for the receipt and classification of cars consigned to industries located on our rails." (R. p. 546).

The Superintendent of the Junction testified:

"\* \* \* about the second day we were doing it, I don't know what we would do with the dead freight that we did not yet handle because we were trying to segregate and handle livestock \* \* \* we would have to sacrifice the other freight for the livestock." (R. 529-30)

Although the extremely difficult and impractical character of the proposed operation is quite evident when it is considered in connection with the present delivery time required on dead freight, that comparison substantially understates the operating burdens which the Junction

would have to assume. (R. 499-500) The figures with respect to dead freight relate to switching operations as they are now performed in the Ashland Avenue Yards, but they do not reflect the wholly dissimilar switching operations which would be necessary if the livestock consigned to the packers were handled in those yards. In performing its traditional and customary job of receiving, classifying and delivering dead freight consigned to the 499 industries served solely by it, the Junction employs the time saving and efficient technique of a "kicking" operation. (R. 543-44) The Commission described this practice as follows:

~~"In the ordinary and usual course of classifying~~  
dead freight by the Junction, the engine pushes a string of cars along a track leading to the classification tracks. Uncoupled cars are 'kicked' or given impetus to roll freely through a switching lead onto the proper classification track." (R. 65)

It is only by such a method that the Junction can handle the great flow of traffic through this yard. But livestock cannot be switched in that manner. Because of its extremely perishable nature, it must be shoved to rest and carefully placed on the receiving and classification tracks. (R. 469, 543-44) As the Commission stated, "if livestock were so handled it would result in injury to the animals by being thrown against the ends or sides of the cars or knocked down. Cars of livestock must necessarily come to rest without rough shocks or jolts." (R. 65-66) It should also be emphasized that that painstaking and time consuming method of switching would have to be employed with respect to a commodity as to which the statutory confinement time has almost expired and must therefore be delivered in a fraction of the time that is now required for dead freight in the Ashland Avenue Yards unburdened with livestock and switched by the much speedier practice of "kicking".

It would not only be necessary to shove and carefully place the cars of livestock, which would move through the Ashland Avenue Yards. The tremendous volume of dead freight would also have to be handled in that same manner. (R. 544) Because of the lack of any space for expansion of the Junction's receiving and classification facilities, the livestock would have to be handled on the same tracks that are presently utilized to capacity for dead freight, assuming that space could be found for that traffic. (R. 495-96, 539-40, 543-44, 563) Once the cars of livestock were carefully brought to rest, subsequent cars of dead freight could not be kicked and allowed to roll against the cars of livestock. (R. 544) As the Commission stated:

"Whether the livestock were handled alone or together with the dead freight, the cars could not be simply 'kicked', but would have to be switched and actually placed on the receiving track to avoid risk of injury to the animals; and, once the cars were so placed, subsequent switches of dead freight could not be 'kicked' and thus permitted to roll freely against the cars of livestock." (R. 73)

"In its work of classifying dead freight for switching delivery, the Junction, which serves, not only the packers, but hundreds of other industries, follows the usual and time-saving practice of 'kicking'; whereby uncoupled cars at the end of the string of cars being classified are sent on their way over the switching lead and onto the proper classification track; but if classification track 19, or any other, were to be used for the livestock destined to complainant, neither the livestock cars nor subsequent cars of dead freight could be so 'kicked', but would have to be pushed over the lead and along the track to the point of placement, such cars remaining coupled until brought to rest." (R. 73)

In short, the service which would have to be accorded to the packers' livestock in the Junction's yards would revolutionize the operations in those yards and would in fact precipitate a total collapse of the terminal service in the stockyards area. Witness Sorenson, one of the principal operating officers of the Junction, testified:

"In my considered opinion, based on my 20 years' experience in the operating end of the railroad industry, all of which has been spent in terminal yards, if the Chicago Junction Railway was forced to handle direct shipments of livestock for delivery to private sidings of the packing companies located on our rails, the net result would be the complete breakdown of the operation of the Chicago Junction Railway." (R. 548)

It is also clear that the Junction's efforts to "work" a large volume of livestock through yards saturated with dead freight would seriously interfere with and impede the efforts of the line-haul carriers to interchange traffic with it in the Ashland Avenue Yards and to deliver the producers stock at the public yards. As the operating witnesses testified, the Junction's efforts to segregate this livestock according to consignee and to dig it out from between cars of dead freight would preclude the use of its receiving tracks for set-outs by the line-haul carriers. (R. 469-70, 529, 546, 613) The trains "piled up" on running track 1103, waiting for an opportunity to interchange livestock and dead freight with the Junction and to deliver livestock at the public yards, would have to remain there, thus blocking any movement on that main running track and further compounding the delays and difficulties which would accrue from the proposed operation. (R. 612-13, 637)

Witness Starbuck of the Burlington stated the practical

effect of this Junction operation upon the crews and engines of the line-haul carriers:

"\* \* \* while the C. J. is switching cars on their lead [track] no other engine can enter that yard during the time that operation is being performed."  
(R. 613)

Witness Heide of the Rock Island described these difficulties which would result from the Junction's attempt to handle this tremendous increase of new traffic as follows:

"The Junction would be getting livestock and dead freight set out all over its yards, mixed right in together. It would have to switch out the livestock from the dead freight, and then block the livestock at Ashland Avenue according to the consignee. All this activity—if the job can be done at all—would mean more delay to the Rock Island when it attempts to place its cars on the Ashland Avenue interchange. If the Junction is blocking the receiving yard lead because of an attempt to separate and then collect stock, dead freight or perishables, we just aren't going to be able to set off our cars of stock at that point. Neither is the fellow ahead of us or behind us. And furthermore, if the Junction hasn't been able to clear out stock which had arrived previously because of these difficulties, there isn't going to be any room for us to put our stock on the interchange tracks. How the Junction people could do it I don't know. I do know, after many years' experience in this area, that the Junction's handling, however it does it, is going to have a very bad effect upon our operations." (R. 659)

The attempt of the Junction to handle thirty-five to forty thousand cars of stock in the Ashland Avenue Yard would not be the only source of difficulty inherent in Swift's proposal. The problem raised by the attempted

return of an equivalent number of empty stock cars by the Junction would be equally serious. Today all empty stock cars are brought back to the outer yards by the line-haul crews as soon as they are unloaded at the chutes. This is a relatively fast and efficient operation which requires no interchange, and places no burden upon the tracks in the Ashland Avenue North Yard. (R. 469, 548) But the Swift proposal would require the Junction to collect all empty stock cars at the private sidings, run them either into the Ashland Avenue or Loomis Street yards and classify them according to the line-haul carrier which was to receive them. (R. 470, 547-48) This would materially interfere with the attempt of the line-haul carriers to make setouts at Ashland Avenue. For example, in order to return empty cars from the proposed Swift facility to that part of the Ashland Avenue Yard where the Junction interchanges the empty cars with the line-haul carriers, the Junction would have to cut across and interfere with the main running track which must be used to get stock to the public chutes. (R. 637) Likewise, the line-haul carriers would not be able to get in to make setouts at Ashland Avenue because the Junction could not get over to the North Yard to place the empties without blocking the tracks the line-haul carriers use in making such setouts. (R. 637, 660)

The handling of the empties would cause serious difficulties because of another factor. In the opinion of the carriers' operating officers, their roads would have to send additional engines and crews down to Ashland Avenue to pick up the empties as they assemble in Ashland Avenue. (R. 660, 683, 700)

Witness Stein described the problem the North Western would face as follows:

"Today, we have several transfer runs every 24

hours that pick up traffic including empties for our line in the Ashland Avenue District, but the point is that we will not be able to depend upon those transfer trains to handle the greatly increased number of cars the Junction will be turning back to us at Ashland Avenue, and in my opinion there is not ample facility in this congested yard for assembling and holding the number of stock cars which will be made empty awaiting movement on scheduled transfers. This is one illustration of the necessity of operating additional engines which will be required in this congested area." (R. 638)

The handling of these empties will be particularly acute with respect to the Rock Island which, entering the stockyards area from the east, never takes stock cars, loaded or empty, as far as Ashland Avenue. (R. 660) Under this proposed setup the Rock Island must, of course, take stock into the Ashland Avenue Yard and pick up empty stock cars at this yard. In this connection Witness Heide observed:

"I know that we would have to send down additional engines to collect these empties under the proposed arrangement. Today, we have two runs every 24 hours to pick up cars from the Junction. Now, those trains can handle just so many cars. Furthermore, the Junction would probably have to ask us to act more quickly in getting the empties out of the Ashland Avenue Yards than twice in every 24 hours." (R. 660)

Thus, here again the proposal would require the cramming of additional engines and crews into the narrow and confined Ashland Avenue Yards and the stockyards area.

**c. The Proposed Operation Will Require Greatly Increased Service With Respect to Livestock Because of Setouts for Feed, Water and Rest Which Would be Required by Federal Statute.**

The requirements of the Federal Confinement Law would also pose most serious operating difficulties in connection with the proposed private track delivery of livestock. Once unloaded to comply with the law the stock must remain outside the car a minimum of five hours. (45 U. S. C. § 71) The effect of this regulation in its relation to the question here is apparent from a study of the time schedules of stock cars moving into the Union Stock Yards. A substantial percentage of the stock coming into the chutes is running on very short time and any delay would mean a violation of the Federal law unless provision be made for an additional stop for feed, water and rest. (R. 642-43, 680-81) Exhibit 45 shows in detail the very close margin of safety on much of this stock. (R. 825-26, 1681-1842) The increased delay in the yards of the line-haul carriers and at Ashland Avenue, would mean that a great volume of stock which is now delivered within the prescribed time would have to be unloaded to avoid violation of the law. (R. 619-20, 642-43, 657, 680-681, 702-03) Since there are no facilities on the Junction to feed, water and rest the animals, it would fall to the line-haul carriers to unload the stock, either in Chicago, where adequate facilities do not presently exist, or by a complete reorganization of their operating schedules, to provide unloading at some intermediate point. (R. 489, 619-20, 643, 657, 681) The former would occasion delay and added service not only to stock on short time but to other stock on sufficient time which must be separated out from those cars which must be unloaded. (R. 643) For example, *witness Stein of the North Western estimated that during the period from April 15 to May 15, 1947, 209*

*cars of livestock from 36 trains, constituting 33 per cent of the trains hauling livestock during this period, would have required set-outs for feed and rest if the proposed plan with all its delays had been in effect. (R. 642-43)* To meet such a condition it would be necessary for the line-haul carriers to revise their livestock schedules and provide an additional stop for a substantial part of the traffic. (R. 643, 657, 682-83, 702)

By this latest effort to secure a special advantage, Swift would precipitate the collapse of an operating system founded upon the long recognized principle that the regular terminal for livestock in the stockyards area in Chicago is the public yard. At the time that the Hygrade Company proposed the identical service to its plant in the stockyards area, Swift advised the Commission that "the complainant desires to overturn a method of receiving livestock which has been a part of and essential to the growth and operation of the Chicago live stock market" (Appendix A, pp. 35-36), and that the plant-door delivery sought by its competitor "would absolutely demoralize transportation in or about the stock yards." (Appendix A, p. 48) This is an equally accurate characterization of what Swift itself now proposes.

The evidence which describes the disastrous consequences of attempting to work livestock through the Ashland Avenue Yards proves the Swift proposal to be a physical and practical impossibility, and as pointed out, the testimony of the operating officers as to the conditions which would be created by Swift's proposal is uncontradicted on this record. It may fairly be said that its accuracy is accepted. Swift conceded in the submission of its case in chief, on the first day of the hearing that it was not concerned with the practicality or the possibility of performing the service requested by it. (R. 336-39) The carriers then offered a mass of operating evidence showing in full detail

the operating conditions which would be created by Swift's proposal. Before the conclusion of the hearing, and nine days after Swift had acknowledged that it was not concerned with the operating results of its request it offered rebuttal testimony on miscellaneous matters of highly dubious relevance, but it made no pretense of questioning the accuracy of the testimony as to the conditions at Ashland Avenue, and the result which would flow from the change in practice which is here proposed. We desire particularly to emphasize the fact, as the record shows, that Swift employs yardmasters who spend their working lives in the Ashland Avenue Yard and are fully acquainted with the railroad operations in that area. (R. 1034) Swift dared not call these men as witnesses either in chief or on rebuttal. It made its presentation through a tariff man. The explanation for all this is apparent. As shown by its brief in the *Hygrade* case, Swift recognizes that the statements of the railroad witnesses as to the operating consequences of this proposal are correct and unassailable.

**d. Direct and Immediate Injury Would Result to Shippers of Livestock to the Stockyards and to Shippers of Dead Freight in the Stockyards Area from the Difficulties Inherent in Any Attempt to Work 75,000 Cars of Added Traffic Through the Ashland Avenue Yards.**

The effect of this proposal on the handling of the producers' livestock which would continue to go to the public yard makes it clear that Swift is not interested in the continuance of the public yard in Chicago or the maintenance of the livestock market in that yard. In addition to the serious financial and operating consequences to the railroads through the disruption of their terminal service, it is abundantly clear from the testimony that the consequences of this proposal would fall heavily upon the shippers of

other freight and particularly the shippers of livestock who would still desire to consign their stock to the Union Stock Yards. (R. 496, 500, 624-25, 638-39, 655, 683)

The producers who intervened in this proceeding in opposition to the complaint, both in the lower Court and before the Commission, testified to the adverse effect of the proposal on their interests. They are ably represented and will present their own case. It should be noted, however, that the duties of the railroads in the handling of the producers' stock are clearly defined, and if they are not properly discharged, damage results and claims are invariably filed.

The producer counts upon his stock reaching the Chicago market in the very early morning hours and the well-established railroad schedules are set up to meet this essential requirement. (R. 719-21) A delay of even a few hours would frequently mean that the producer would miss the intended market. (R. 721) But the consequences of delay are not limited to loss of market. The shippers claim that physical damage to stock invariably results from serious delay. (R. 721-22) It is indisputable that the delays incident to this proposed change would force the roads to revise their livestock schedules, thus providing an additional unloading for feed and rest of stock which could not be delivered within the time allowed by law. (R. 643, 657, 682-83, 702) But this would itself increase the expense of handling and the loss to the shipper. One witness testified:

"Our figures show that on shipments that we have made where the cattle have to be unloaded and fed at one time our shrink would amount to practically twice as much as it will if they can get through without an unloading while en route." (R. 772)

Witness H. R. Park, presently and for 29 years traffic manager of the Chicago-Livestock Exchange, summed up the effect of the Swift proposal as follows:

"I would say, Mr. Belnap, it would crucify the Chicago market if things came to pass as has been depicted here by these railroad witnesses. It would crucify the Chicago market." (R. 722)

The railroad operating officers emphasized the consequences of the proposed change on the market stock.

Witness Starbuck of the Burlington stated that there would be delay to all livestock "with greatest delay occurring to stock which would still be delivered to U. S. Yards." (R. 624-25)

Witness Stein of the North Western testified as follows:

"One of the important facts about this added delay is that people will suffer who have nothing to do with the proposal; namely, shippers who still choose to take their deliveries at the unloading chutes. When we are delayed at Ashland Avenue because of the Swift demand, it is going to mean, of course, that that stock which must run through Ashland Avenue to get to the Yards is going to be held up while the operations just described are taking place in that area." (R. 638-39)

Witness Heide summed up his testimony by stating:

"In my opinion, if the Rock Island and all these other carriers were required to throw all this livestock on the hands of Junction at Ashland Avenue, it is going to create a terrible congestion there. I would like to further say that this congestion and delay is not going to be just on stock consigned to these packers

but is going to definitely delay stock which we still have to deliver to the stockyards and the delivery of dead freight as well." (R. 655.)

Witness Heide's testimony concerning dead-freight calls attention to another consequence of the proposed change; namely, that the carriers which would have to furnish this new service to the 13 packing plants in this area also have obligations to hundreds of other industries in Packing-town. The responsibilities to maintain efficient service on the dead freight and perishables could not be met. Even under present conditions it takes the Junction nearly 32 hours from the time of interchange with the line-haul carriers to effect delivery of dead freight. (R. 471)

The Junction's principal operating officers summed up the plight of shippers of dead freight as follows:

"I would say from my own observation that about the second day we were doing it, I don't know what we would do with the dead freight that we did not yet handle because we were trying to segregate and handle the livestock.

"Exam. Diamondson: In other words, it is your position based on the present track facilities, you just could not do it?

"The Witness: That is correct, we would have to sacrifice the other freight for the livestock." (R. 529-30)

"This would also result in our being unable to switch cars of dead freight consigned to industries on our railroad because of our switching leads being tied up in the handling of this livestock. It would so seriously hamper our switching operations that in my opinion as an operating man, we could not keep our yard open for the receipt and classification of cars consigned to industries located on our rails." (R. 546)

The disruption of service to other industries would not be confined to those in and around Ashland Avenue. The operating witnesses of the line-haul carriers testified that the delay to the livestock imposed by Swift's proposal would ultimately force the railroads to overhaul their schedules to provide for additional stops for water, feed and rest. (R. 643, 657, 682-83, 702) The effect of this upon other freight was described by witness Stein of the North Western as follows:

"We have a through time freight train and those are the trains on which stock is usually carried. We will say that train is operating from Omaha to Chicago. The schedule is set up with certain terminal points for switching for any setouts or additions, inspection and servicing of the trains and based upon years of experience and operation, that train is fitted in between other trains, freight and passenger alike, and streamliners, and we have many of them on our lines. We have a train to Calumet which carries quite a bit of Swift and Company stock quite regularly. That train is now set up so that if we had to make a stop say at West Chicago to set out one car of stock, that train would make no eastern connections. That schedule of that train would be entirely disrupted.

"Q. Do you have a number of trains that are on tight schedules of that sort that would be interfered with by these additional settings out?

"A. Yes. Mr. Kinsella and Mr. Sorensen of the Junction have emphasized the delay and inconvenience which will result to other non-packer shippers on the Chicago Junction. Similarly with the North Western, the Swift demand will not merely add cost and confusion to our handling of stock, but will inevitably delay our deliveries for other industries." (R. 644-45)

It must be emphasized that the proposed method of handling would also seriously impede the return of the empty stock cars for reloading, the prompt handling of which is obviously imperative to the normal flow of live-stock to the public markets. The Junction would be required to collect the empties, bring them into Ashland Avenue Yards and then sort them out for a return to the line-haul carriers. (R. 547-48) Mr. Sorensen of the Junction estimated that its part of the operation would result in "at least a 24 hour delay in most cases to this equipment, which presently it is not receiving." (R. 548) Witness Keisele of the Milwaukee explained the additional difficulties and delays which would attend this change in the method of returning empty stock cars, stating:

"The proposed plan would result in the change in the handling of return empty stock cars after being unloaded at the packers' plants. Our present agreement with the labor organizations would not permit stock relief crews to pick up empty stock cars at either Ashland Avenue Yard or Seeley Avenue Yard upon return from the stockyards, and this would result in the operation of additional crews to handle the empty stock cars for return movement to Bensenville.

"It is estimated that the required handling under the new plan would result in as much as *two days' additional delay in returning the empty cars to the stock loading territory for subsequent loading.*" (R. 683, italics added)

The conclusion is unavoidable in the opinion of the men who have the responsibility for the conduct of these operations that the interests of every shipper concerned with operations in this area would be adversely affected by the proposed change of practice. As Swift stated the matter in the *Hygrade* case, "the absorption of switching charges in the stock yards district on live stock would completely

demoralize the present system of handling live stock" and "would absolutely demoralize transportation in or about the stock yards." (Appendix A, p. 48)

**3. THE LINE-HAUL RATES TO CHICAGO WERE PRESCRIBED BY THE COMMISSION FOR APPLICATION TO THE PUBLIC STOCKYARDS AND WOULD NOT COMPENSATE THE CARRIERS FOR THE SERVICE NOW REQUESTED BY SWIFT.**

In seeking delivery at its plant in the stockyards area at the flat Chicago rate, Swift is asking that the line-haul carriers be required to absorb the switching charge of the Chicago Junction Railway which was \$28.80 at the time of the hearing. This rate basis has been in effect for many years. It is exactly the same rate, subjected to certain general increases, which the Commission held to be reasonable in the *Hygrade* case. (R. 342-43, 838-39)

The packers may not be accorded a service they do not pay for, and the carriers made studies to determine whether the line-haul rates prescribed by the Commission include any allowance for such a terminal service. The studies prove that the carriers receive no revenue from the handling of the stock on the basis of the terminal allowance in the line-haul rates that could be used to pay, or to permit the absorption of, the applicable switching charge. (R. 952-71, Ex. 50, R. 964, 1856-63; Ex. 51, R. 964, 1863; Ex. 52, R. 971, 1864)

In its report herein, the Commission expressly stated that the line-haul rates to Chicago, prescribed by it in prior proceedings, do not ~~and were~~ not intended by it to compensate the carriers for the delivery service which Swift seeks here. The Commission's discussion of that point is as follows:

"The line-haul rates on livestock to Chicago are Commission-prescribed rates. In *Chicago Livestock*

*Exch. v. Atchison, T. & S. F. Ry. Co.*, 219 I. C. C. 531, 545, 546, we said that 'the line-haul carriers operate over the tracks of the Chicago Junction to the Union Stock Yards and make delivery there thereby making these yards their own terminals.' We pointed out that in prescribing the rates on livestock to Chicago, among other markets, there was specifically taken into consideration as an element 'the rendition of terminal service in connection with the transportation of livestock,' and there was included what was considered 'sufficient to cover such terminal services under a normal operation as well as to cover the unloading and loading of livestock at public stockyards,' *but we did not there consider what the services would be in connection with deliveries of livestock by the Junction on private industrial tracks. That carrier did not then and does not now perform such services.*' (R. 78-79, italics added)

It is indisputable, we submit, that on the basis of the uncontradicted cost studies in the record and the Commission's express finding as to the transportation services covered by the line-haul rates that they do not provide any compensation for plant-door delivery of livestock.

#### 4. SWIFT & CO. DEFAULTED IN THE PRESENTATION OF ANY SUBSTANTIAL SHOWING IN SUPPORT OF ITS CLAIM.

Swift's presentation before the Commission must be deemed, by any standard, an extraordinary one. It has form and bulk, but is utterly without substance. In view of its default in the submission of any substantive showing Swift must take the position that the historic practice of delivering livestock in Chicago should be condemned, regardless of the practicality or even the possibility of the proposed change and regardless of its effect on the public

interest, the shippers, or the railroads. It evinced no interest in the facts and simply went through the form of offering evidence.

The reason is plain. The proposal is so extreme and impractical, and its effect would be so disastrous to every other interest that Swift was obliged to disclaim any knowledge of the realities, despite its position and brief in the *Hygrade* case, and to deal with the whole matter in a peculiarly shallow manner.

The witness Tally, Swift's Assistant General Traffic Manager, offered a number of maps and pictures of scenes in the stockyards area with which the Commission had become intimately familiar through years of litigation involving the delivery of livestock in Chicago. (R. 267-80, Exs. 1-9, R. 389, 1040-46) The witness then submitted his exhibit 10, a document consisting of 27 pages, which may be succinctly summarized. (R. 389, 1047-74)

The first eight pages consist only of an index and certain letters from the respective traffic officers of the carriers to Swift, declining the request which is the subject of this complaint. (R. 1047-52) Those letters give bulk to Swift's presentation, nothing more.

The next eight pages, 9 to 16, inclusive, are devoted to a comparison between the actual per car revenues on livestock delivered to Swift during a certain period and purely fictitious or hypothetical revenue on a number of supposititious shipments of dead freight. (R. 1053-61) The distances which the livestock actually moved; and the distances which the theoretical shipments of dead freight were assumed to have moved, are not shown. (R. 344-45) The compared livestock revenue is actual, the per car revenue on the dead freight is based on the tariff minimum, not the higher actual minimum in effect for years under the orders of O. D. T. (R. 345-46) In the light of these facts it was

not pretended by the witness on cross-examination that the showing has any meaning. (R. 344-45) It proves nothing save that defendants maintain tariff rates on both livestock and dead freight. What conceivable use could be made of it was not disclosed.

The submission of such material reflects nothing but Swift's desire to make some capital of the fact that dead freight is frequently delivered on industrial sidings at the flat Chicago rate, whereas a substantial switching charge is now applicable on livestock delivered to Swift's plant in the stockyards area. But Swift would be the last to accept the rates or service on dead freight as the standard for livestock. It is not attacking the line-haul rates on livestock, and it recognizes, of course, as the Commission has found (R. 65) that the livestock must have a very different and faster service than that accorded dead freight. (R. 300, 340-41) The average time consumed by the Junction in handling a car of dead freight, from the time it is placed in Ashland Avenue until it is delivered, is over thirty-one and a half hours. (R. 471) Under similar circumstances livestock would suffer an additional unloading for feed, water and rest, with all the loss and expense attendant upon that action. This shows the hypocrisy of pretending to rely on comparisons between the handling of dead freight and livestock.

The tariffs pertaining to the delivery of dead freight and livestock in Chicago are essentially the same as those in effect when the Commission decided the *Hygrade* case, *supra*, and found applicable to livestock, and lawful in all respects, *the very switching charge which is here again attacked.* (R. 342-43)

- a. **In Support of Its Section 3 Allegation Swift Offered No Proof That Conditions in Chicago Are Similar to Conditions at Points Named in Its Complaint, and the Carriers Affirmatively Proved the Complete Dissimilarity Between Conditions at Those Points and at Chicago.**

In the same casual manner that characterized its submission respecting other issues in the case, Swift scarcely made a gesture of attempting to support the allegation that it was being discriminated against in Chicago by services rendered to other packers at other points. The reason for this perfunctory attitude is that no one knows better than Swift that conditions governing the delivery of livestock within the stockyards area in Chicago have no counterpart anywhere else in the country. And no one had more to do with that fact than Swift.

The concluding pages of witness Tally's exhibit 10, pages 17 to 27, simply make reference to certain tariff provisions pertaining to delivery of livestock at other points. (R. 389, 1062-72) As pointed out below they show nothing as to the conditions existing at other points in relation to the conditions surrounding delivery at Chicago.

The history, custom and usage surrounding the delivery of livestock at Chicago makes the practice there *sui generis*. The operations there are not remotely comparable to the relatively simple conditions surrounding the delivery of livestock at any of the points named in the complaint. In keeping with the purely routine nature of its Section 3 allegation, and with its knowledge of the actual facts, Swift made no pretense of comparing conditions at the several points named with those existing at Chicago. Nevertheless, as part of their own case, the carriers demonstrated the wide difference between conditions at those points and

Chicago. This showing appears in exhibits 12, 53 and 54, the accuracy of which was stipulated by Swift. (R. 420, 972-75, 1083-90, 1868-1896)

Exhibit 12 shows that with the exception of Sioux City, Iowa, no packer whether he be at Fort Atkinson, Wisconsin or Kansas City, Missouri, or any other point named in the complaint, receives any greater service than does Swift at its Omaha Packing Company plant at Chicago. (R. 973, 1083-90) Each of the packers which receives livestock at its plant is located, like the Omaha Packing Company, on the rails of a line-haul carrier. Indeed, at 25 of the 37 points named in the complaint and tabulated on exhibit 12, there is no public stockyard which can serve, as does the Union Stock Yards in Chicago, as the proper and adequate terminal for livestock at that station. The maps which make up exhibit 53 show more clearly than could words, the relatively simple operation at each of the compared points. (R. 975, 1868-95)

Only at Sioux City does any competitor of Swift receive livestock at a plant located in the immediate area of the public stockyards. (R. 973, Ex. 12, R. 420, 1083-90) Even there, where Cudahy receives a few shipments of sheep at its plant on the rails of the Sioux City Terminal Railroad, the differences in history, custom and operating conditions make any comparison to Chicago ridiculous. The movement of livestock to Sioux City averages less than 15,000 cars a year, approximately the amount of stock brought to Chicago by one of the major roads, and in 1946 Cudahy received a total of only 211 cars directly at its plant, and in 1947, 289 cars. (R. 973-75) In contrast to the revolutionary change in operations which Swift's proposal would work at Chicago, the small movement of sheep to Cudahy's plant involves the identical operation for the line-haul carriers at Sioux City as the delivery of stock going to

the public yards in that city. In either instance the carrier interchanges the cars with the terminal railway in the latter's yard, and the terminal carrier makes all deliveries, both of livestock and other freight. (R. 974-75; Ex. 54; R. 975, 1896)

Referring to the points named in the Section 3 allegation of the complaint, Swift's witness Tally testified on cross-examination: "Well, I will start by saying that I don't know the detailed facts as to the physical operations at any of them" (R. 347), and again "I can't recall any place where the situation is identical [with Chicago]." (R. 348). In contrast the witness Heinemann, whose knowledge of the handling of livestock in the various terminals throughout the west is probably more extensive than that of anyone else in this field, testified that at no point named in the complaint is there a situation which is comparable to the conditions which would be created at Chicago by the delivery of directs at the plants of the packers located in the stockyards area. (R. 945-46)

Counsel for Swift in effect conceded that he was making no attempt to prove his Section 3 allegation, but, instead, was relying on something said by the Commission in its report in the *Chicago Livestock Exchange* case, 219 I. C. C. 531 (1936). This is shown by the following colloquy between the Examiner and Mr. Rynder:

"Exam. Diamondson: Yes. I mean are you going to go beyond the mere showing as to what the tariffs say about delivery at these various points?"

"Mr. Rynder: I don't think you can show that the services at any two points are exactly similar.

"Exam. Diamondson: Well, under an allegation under Section 3 there has got to be some showing of similarity of circumstances and conditions.

"Mr. Rynder: I think the Commission has about

settled that for us. It said in the *Livestock Exchange* case here that that scale was made to cover the origin and terminal costs at all points and as to the deliveries at Chicago that the matter must be considered as an average matter and that there wasn't such a great difference between deliveries at Chicago and at these other Western Trunk Line points as to warrant any difference in terminal treatment." (R. 302)

When asked to identify the language of the report on which he relied to prove that the terminal service at other points named in the complaint is not dissimilar to *the proposed new terminal service to Swift's plant in the stockyards area*, Mr. Rynder made the following statement:

"Mr. Rynder: Here is one statement. I will not go through the entire decision. At page 538:

" 'Although these facts do not establish that the terminal operations at the points mentioned are identical with those in Chicago, it is clear that the character of the services rendered and the charges at the compared points do not vary greatly.' "

Mr. Rynder added:

"And the points they are referring to are named earlier in the decision." (R. 303)

The statement of the Commission which immediately follows the part quoted by Mr. Rynder shows that *the terminal service at Chicago* there stated by the Commission not to "vary greatly" from that rendered at other points, was, of course, the service of making delivery at the public stockyards at Chicago and not the proposed new service to Swift's plant. We quote the part omitted by counsel as follows:

"While defendants' witnesses testified at considerable length respecting the details of the movement, the

terminal service at Chicago is not a complicated one, as was stated at page 122 of the report in *Live Stock-Western District Rates*, *supra*. Most of the trunk lines entering Chicago have direct connections with the Chicago Junction, and their road engines operate into the stockyards, although the crews are frequently changed at the break-up yards as the trains pass through, in instances where the matter of overtime pay is involved. The train proceeds to an unloading platform, the engine cuts loose and, proceeding to the rear, removes the caboose and places it at what was the head of the train. Then, proceeding to the other end, it is ready to remove the empty cars. The unloading is very expeditious as the stockyards now have dock capacity for setting 283 cars of livestock for unloading at one time. Each chute has capacity for two carloads of livestock, so that the first 283 cars may be removed when empty, and 283 more carloads set immediately. The trains' placed at the chutes may contain hogs, cattle, or sheep, in single-deck or double-deck cars, or short cars with long cars, yet only one spotting is necessary to take care of the whole trainload. In other words, no further 'cutting' or 'spotting' is necessary because of different species of livestock or types or sizes of cars." (219 I. C. C. 531 at 538-39)

The reference to the report of the Commission in *Live Stock-Western District Rates*, 176 I. C. C. 1 (1931), which the Commission cited, as shown above, is as follows:

"The terminal service covered by the charge is not a complicated one. The road engines generally operate into the stockyards, although the crews are often changed in the break-up yards as the trains pass through. The train proceeds to the unloading platform, the engine cuts loose, and proceeding to the rear

end removes the caboose and places it at what was the head of the train; then proceeding to the other end it is ready to remove the train of empties. The ordinary train of 30 to 40 cars is usually unloaded in an hour. However, on days when receipts are heavy, trains are frequently required to wait, sometimes for several hours, before they can get into the stockyards." (p. 122)

In its report in *Live Stock-Western District Rates* the Commission then proceeded to discuss delivery of livestock to public stockyards at other points.

It is thus perfectly clear that the Commission was comparing the delivery of livestock at the public stockyards in Chicago with the delivery of livestock at public stockyards elsewhere. As the Commission stated in its present report, "we did not there consider what the services would be in connection with deliveries of livestock by the Junction on private industrial tracks. That carrier did not then and does not now perform such services." (R. 79) We think the effort on Swift's behalf to make it appear otherwise, speaks for itself, and very eloquently. It was an effort to pervert the Commission's clear statement into a finding that the conditions which would be encountered in delivery of livestock at Swift's plant, as here proposed, would not be dissimilar from terminal services performed at other points. The Commission had no such question before it and made no such finding; consequently in its reliance on the report in the *Chicago Livestock Exchange* case, Swift is simply in default of any showing in support of its Section 3 allegation.

- b. **Swift Did Not Call Its Yardmasters to Testify as to the Operating Conditions in the Stockyards Area, But Instead Attempted, Unsuccessfully, to Qualify Its Rate Witness to Deal With That Subject.**

Swift recognized that it should at least make a pretense of offering some showing concerning the operating conditions in the stockyards area. Because of the great volume of Swift's dead freight handled by the Junction through its Ashland Avenue Yard, Swift employs a general yardmaster and several assistant yardmasters who have had training as operating men and who work in the Ashland Avenue Yard with the Junction's operating officers. Presumably these men are intimately familiar with the railroad operations in that area. (R. 1034) They were not called as witnesses. Instead, a rate or tariff man, the witness Tally was asked to testify on the subject. Witness Tally testified:

"Q. I believe you said that you were quite familiar with the operations in the Ashland Avenue Yard and the layout there, did you not?

"A. I said that I had a general idea of it. I have watched the operation on several different occasions, I am not a yardmaster or out there every day. I won't say that I have complete knowledge." (R. 328)

Witness Tally then proceeded to disclose the fact that he knew nothing about the operations in the Ashland Avenue Yards and, of course, he was not asked by his counsel to discuss the really critical point as to the operations which would have to be performed to effectuate the new proposed service.

It was developed that the witness Tally was unacquainted with the track layout of the yard (R. 328-29) or with the approximate volume of traffic handled there. (R.

329) He thought that the predominant movement of stock to the yard was in consolidated trains, whereas the reverse is true. (R. 330) He was completely misinformed as to how the stock is handled on consolidated trains, a point, which of very great significance in its relation to Swift's proposal. He erroneously thought that the stock in a train with dead freight was handled on the head end of the train and taken at once to the yard. (R. 330-31) Actually, the operating necessities are such that the dead freight is on the head end, and the stock is cut off and left standing on the running track, thus blocking that track, and the sole ingress to the stockyards until the cars to be interchanged with the Junction have been set out in the Ashland Avenue Yards. (See *supra*, pp. 39-40) •

The witness admitted finally that he did not understand even the present operations and could not describe them. (R. 331-32) The witness conceded, also, and we think the fact is entitled to great emphasis, that Swift, which had just experienced the most profitable year in its history under the existing practice (Ex. 11, R. 397, 1074-82), filed the complaint before the Commission and made the charges and the demand stated in the complaint without the slightest concern as to the practicality of its proposal, or its profound effect on any of the many other interests involved. (R. 336-39)

### 5. The Commission's Findings.

On the basis of the evidence discussed above and considered in detail in its report, the Commission found:

10 "We find (1) that in the circumstances presented, the published switching charges in addition to the line-haul rates will not be unreasonable or otherwise unlawful for the transportation of livestock for delivery on the private sidetracks to be constructed by com-

plainant, which will connect with the Junction, provided that the tracks to be constructed will be adequate for deliveries by the Junction at its ordinary operating convenience and without interruption or interference, and (2) that the establishment of joint rates for the transportation of this traffic is not necessary or desirable in the public interest." (R. 81)

With reference to the reasonableness of the switching charge, the Commission stated:

"The evidence affords no basis for a conclusion that the terminal charge of the Junction in addition to the line-haul rates is unreasonable for deliveries of livestock to the proposed plant, considering services and modification of services that would be required for the desired deliveries and the effect upon terminal operations generally of performing such delivery service to the proposed plant." (R. 80)

The Commission found that the existing charges were not prejudicial to livestock as a commodity, stating:

"The measure of transportation services rendered shipments of live animals is substantially greater than that accorded dead freight. Livestock cannot be switched in the same manner as other freight." (R. 65)

Its findings with respect to deliveries of livestock at the Union Stock Yards and at Swift's Omaha plant pens in Chicago were as follows:

"The transportation services, conditions, and circumstances connected with deliveries at the Omaha plant pens are substantially dissimilar from those connected with the delivery here sought. There, the unloading chutes are on the rails of a line-haul car-

rier, outside the stockyard congested area, and the delivery made by that carrier is nothing more than a simple switch, at carrier's ordinary operating convenience and without interruption or interference from connecting line engines, as all of the switching is under the control of and performed by the Burlington. The transportation services, conditions, and circumstances connected with deliveries by the line-haul carriers at the unloading chutes of the Union Stock Yards, as hereinbefore described, also are substantially dissimilar from the private track delivery sought." (R. 78)

In regard to Swift's allegation of preferential treatment to certain points named in paragraph VII of its complaint, the Commission found:

"There is no showing that services as desired will result in a situation similar to that at a point or points alleged to be preferred." (R. 79)

With respect to the difficulties inherent in the proposed practice and its effects upon terminal operations in the stockyards area, the Commission made the following findings:

"Under the present practice, followed since the inauguration of services to the Union Stock Yards in the interest of expeditious centralized delivery, the yards of the Junction are not burdened with livestock cars either loaded or empty. It clearly appears that any attempt by the Junction to make deliveries of livestock generally to packers or to transport an amount of livestock substantially greater than complainant's present needs, would result in serious disruption of operations and services and serious delays in the delivery of livestock." (R. 71)

"We have indicated generally the difficulties which

would confront defendants if required to make delivery of livestock at complainant's plant, the basic difficulty being that such method of delivery is not adapted to defendant's service, tracks and yards, as specially designed and developed, along with the city's intensive development, for performance of the centralized delivery service rendered at Chicago. For some 70 years the method of conducting terminal operations in the stockyards district has been for the line-haul carriers, using Junction tracks, to carry all shipments of livestock to the stockyards and make deliveries there, and for the Junction to perform the switching and spotting of other freight for the packers and many other industries in the area. As a result, the Junction's main tracks, its yards and subyards and their tracks, are peculiarly designed and fitted for the operations and services described, and any change, particularly as contemplating deliveries of livestock to the plants of the packers, would, as might be expected and as is shown, require a conflicting use of such yards and tracks and subject defendant's operations to interference and delays." (R. 72)

The Court will note that what is here described as the "basic difficulty" is that arising out of the practice which Swift actively initiated and sponsored in order that it might profit as a partner in the public yards. (Ex. 42, R. 1174-1638, 316 U. S. 216 at 227-31)

"While, as above stated, any cars of livestock consigned to complainant could be handled in consolidated trains by grouping such cars at the head of the train with cars of dead freight intended for set-out in the south yard, nevertheless, because of difficulties peculiar to livestock traffic, such handling would, it appears, affect adversely the line-haul carriers' operations in carrying livestock to the stockyards." (R. 72)

"While these conditions—all necessitating prompt handling of the traffic—are suited to the practice, long followed, of making deliveries of all shipments of livestock at the stockyards, they are not, it is evident, at all suited to the plant delivery service sought by complainant, in the performance whereof the cars of livestock would have to be switched and otherwise intermingled with cars of dead freight which latter, it appears, may, in the case of perishable freight, require nearly a full day for movement through the yards to points of delivery, and in the case of other dead freight, nearly 32 hours." (R. 74)

"Having in mind the congested condition of yards and tracks, it is clear that the attempt to make plant delivery through and over them of even 18 cars of livestock daily would considerably delay and burden defendants' operations. Moreover, although it is shown that complainant's direct shipments of livestock average 18 cars a day, such average necessarily includes days when the shipments exceeded 18 cars. Also it appears that the number of complainant's direct shipments of livestock in proportion to the number bought at the stockyards has been steadily increasing, and the testimony of complainant's witnesses affords ground for the belief that that condition will continue." (R. 74-75)

In response to the statutory requirement that the joint rates sought by Swift must be "necessary or desirable in the public interest" (49 U. S. C. Sec. 15(3)) the Commission made the following findings:

"There is no warrant, however, for a conclusion that the establishment of joint rates as desired by complainant is necessary or desirable in the public interest." (R. 77)

“\* \* \* establishment of joint rates for the transportation of this traffic is not necessary or desirable in the public interest.” (R. 81)

These two findings taken together not only mean that Swift failed to satisfy the statutory specifications for the relief sought by it, but that the evidence of record affirmatively demonstrates that such joint rates would be contrary to the public interest. As noted above, Swift has not assigned error with respect to these two findings and in all of the 140-some pages of its brief in this Court there is not a single reference to these two vital findings. Swift thereby admits, we submit, that it has not established its right to the relief which it sought.

The findings quoted above, as well as the others which appear in the Commission's report, are addressed to every issue in this case. We respectfully submit that these findings are abundantly supported by the evidence discussed above, and that the record before the Commission required the findings which it made. There is no evidence to the contrary in this record.

## **II. THE COMMISSION'S FINDINGS ARE IN ACCORD WITH THE APPLICABLE AND GOVERNING PRINCIPLES OF LAW AND FULLY SUPPORT ITS ORDER OF DISMISSAL.**

The principles of law which govern the issues raised by Swift's complaint before the Commission have been stated by this Court on numerous occasions and are well settled. It is elementary, of course, that a rate which fairly reflects the quantum and character of the service performed is not unreasonable, and that a difference in charges is not discriminatory or preferential where the services involved are rendered under substantially dissimilar circumstances and conditions. *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541 at 549-50; *Manufacturers Ry.*

*Co. v. United States*, 246 U. S. 457, at 481-82; *L. T. Barringer & Co. v. United States*, 319 U. S. 1; *United States v. Wabash R. Co.*, 321 U. S. 403 at 410-13; *New York v. United States*, 331 U. S. 284 at 305.<sup>1</sup> It is these very principles which the Commission applied in its determination of Swift's complaint, and it was the conclusion of the lower court that the Commission's application of these principles was without error. (R. 195) These findings dispose of every contention advanced by Swift and fully support the Commission's order of dismissal.

### III. THE PURPORTED ERRORS URGED BY SWIFT ARE WITHOUT MERIT.

Swift's first point concerns the following finding made by the Commission:

"The evidence affords no basis for a conclusion that the terminal charge of the Junction in addition to the line-haul rates is unreasonable for deliveries of live-stock to the proposed plant, considering services and modification of services that would be required for the desired deliveries and the effect upon terminal operations generally of performing such delivery service to the proposed plant." (R. 80)

Swift says that this was "the sole finding of the Commission as to the quantum of the switching charge." (Brief, p. 50) Actually it is merely a conclusion, which by the reference to "services and modifications of services required for the desired deliveries" is expressly based upon the numerous findings on this subject to which the Commission devoted almost its entire report. The Commission's conclusion is supported by detailed findings as

<sup>1</sup> We also refer the Court to Swift's discussion of Sections 2 and 3 of the Interstate Commerce Act in its brief in the *Hygrade* case. (Appendix A, pp. 10-28, 55-56)

to the services covered by the Junction's terminal charge and as to the services required for delivery of livestock to the Union Stock Yards and for delivery of ordinary freight through the Ashland Avenue Yards. The Commission in its report made a step by step comparison of each of these operations which showed that the delivery of livestock to Swift's sidetrack requires services substantially dissimilar from and much greater than those required by either of the other operations. (R. 60-79) Swift's objection must be evaluated therefore not in terms of the one sentence quoted from the report, but in terms of the total effect of all the Commission's comprehensive findings.

While Swift pretends to ignore these primary, underlying findings,<sup>1</sup> its contention must be construed to mean that these findings were not enough to support the conclusion that the Junction's switching charge was not shown to be unreasonable. In the light of the findings establishing the substantial difference in the quantum and nature of the service covered by the compared rates, Swift finds it necessary to contend that the Commission's conclusion is unsupported because it did not make findings as to the precise dollars and cents difference in cost between the delivery of livestock at the packer's plant, on the one hand, and on the other, the delivery of livestock at the public yards and the delivery of ordinary freight at industries on the Junction.

Swift's position is, therefore, that in the absence of such cost findings, the Commission was obliged to find the Junction's switching charge to be unreasonable. But the burden of proof was on Swift. It is well established that the burden of showing the unreasonableness of a

<sup>1</sup> Swift asserts that there is not a "syllable of evidence" or a "shred of testimony" on which such findings could be based. (Brief, p. 55)

rate in a complaint proceeding is always on the complainant. *Louisville & Nashville R. Co. v. United States*, 238 U. S. 1, 11 (1915); *Miller Brothers Foods Co. v. Atchison, Topeka & S. F. Ry. Co.*, 273 I. C. C. 562, 565 (1949); *Moore Business Forms, Inc. v. New York Central R. Co.*, 274 I. C. C. 404, 407 (1949).

It appears to be Swift's theory that a complainant meets the burden of proving a rate to be unreasonable simply by referring to the rates charged for other services, no matter how dissimilar such other services may be, and that when this is done the Commission must strike down the rate attacked as unreasonable unless the defendant carriers or the Commission itself have produced studies establishing the precise dollars and cents cost of the services covered by the rate attacked and by the other rates referred to.

Entirely apart from the fact that here the burden of proof was upon Swift, it has never been held that an assailed rate must be found to be unreasonable *per se* unless it is supported by a finding as to the costs of the service rendered. This court has said recently as to this in *Alabama G. S. R. Co. v. United States*, 340 U. S. 216, at 223: "Neither the Commission nor this court has held that lesser cost of service is a finding without which the Commission may not fix a charge, division of rate, or differential." No court has ever held that a rate is unreasonable unless justified in terms of mathematical cost relative to the rates covering wholly different services. In the earlier case of *Commission v. Texas & N. O. R. Co.*, 284 U. S. 125, this Court disposed of a contention similar to that which Swift advances, stating:

"While in the making of reasonable rates all the

material facts are to be regarded, it has never been deemed necessary or practicable—if indeed it is at all possible—to ascertain in advance the cost to carriers of each of the various elements embraced in the transportation service. The Act does not require any such determination.” (p. 132)

Swift has not cited any cases in support of its position because it cannot do so. It has cited cases only for the general proposition that there are circumstances in which subsidiary findings are required to support an ultimate finding.<sup>1</sup> One of these cases clearly shows the error of Swift's position. In *New York Central R. Co. v. United States*, 99 F. Supp. 394 (D. Mass., 1951), affirmed, 342 U. S. 890 (1951) the court, discussing the kind of a case which is presented here, stated:

“The difference in physical operations might indicate that the rates to the ports would not have to be the same; to that extent, the Commission's statement that the terminal operations are sufficiently different ‘to warrant’ the differential may well be accurate. And of course this was all the Commission had to decide in the 1941 proceeding, for there the carriers were defending the differential against attack by the New York port interests. *Port of New York Authority v. Baltimore & Ohio Railroad Co.*, 248 I. C. C. 165 (1941). The present proceeding is quite different.”

It is thus obvious that in this case, the carrier's evidence as to the substantial dissimilarity of the services not only

<sup>1</sup> *Florida v. United States*, 282 U. S. 194; *United States v. Baltimore & O. R. Co.*, 293 U. S. 454; *United States v. Chicago, M. St. P. & Pac. R. Co.*, 294 U. S. 499; *Interstate Commerce Commission v. Mechling*, 330 U. S. 567; *New York Cent. R. Co. v. United States*, 99 F. Supp. 394 (D. Mass.), affirmed, 342 U. S. 890; *Tennessee Valley Authority v. United States*, 96 F. Supp. 409 (N. D., Ala.); *Palmer v. United States*, 75 F. Supp. 63 (D. D. C.).

precluded a finding of unreasonableness but in fact required the contrary conclusion.<sup>1</sup>

After the complaint was filed the Junction sought to cancel the long established switching rate applicable to the plant-door delivery of livestock in this area because of the great difficulty of making such a placement and the fact that the rate has practically never been used. Swift, joined by Armour and Wilson, protested and accordingly the Commission required that the rate be retained in the tariff for such use as might be made of it and found the rate to be reasonable and lawful for the service covered. Swift now asserts that the switching charge is not "an honest fee measured by the cost of services to be rendered," but is instead a penalty charge. (Brief pp. 56-62) The Commission did not, of course, measure in dollars and cents the cost of the service which Swift seeks, which has never before been performed, and which Swift formerly described as "very expensive, very difficult", and "impossible." (Appendix A, pp. 47, 50) The Commission did investigate, analyze and describe in full detail the special services that would be required to accomplish such a delivery of the stock, and found on the basis of that evidence that the rate had not been shown to be unreasonable. Now the strange contention is advanced that when the Commission refused to permit the rate to be cancelled, as the packers demanded, and found the measure of the rate to be warranted by the quantum and nature of the services covered, that the Commission was guilty of establishing a penalty charge. In characterizing the rate as a penalty, Swift is simply resorting to epithet. It is inevitable that a rate covering

<sup>1</sup> A determination of the precise mathematical cost of performing plant door delivery of livestock in this area reflecting all the factors which would be involved in such an ascertainment would be an undertaking of great magnitude. Moreover, in view of the extreme differences in the quantum of the services covered by the compared rates a cost study would have been superfluous.

plant-door delivery of livestock in this area under the circumstances attending such a service must exceed the charge for the efficient and economical delivery to the public yard or Swift's Omaha plant. But the fact that Swift naturally does not use the higher rate applicable to the more onerous service does not make the higher rate in any sense a penalty charge.

In this connection and in support of practically every argument made by it, Swift elaborates at great length what it characterizes as an "inconsistency" in the Commission's report. (Brief, p. 60) This argument is summarized at page 2 of Swift's brief as follows:

"2. Whether the Interstate Commerce Commission may lawfully sanction a high additional charge for switching service in respect of a single commodity to a particular sidetrack which service it asserts would lead to interference with and disruption of terminal transportation operations, where it refrains from prohibiting such switching service altogether, where it cancels as 'not just and reasonable' a proposal by a carrier to exempt that particular commodity from transportation altogether and where it permits the identical service by the same carrier without such additional switching charge in respect of the same commodity consigned to a stockyard on the same line of railroad a few city blocks distant from the same sidetrack."

A careful reading of the text shows that the essential question posed by this argumentative statement is the question whether the Commission may find lawful, and forbid the cancellation of a long existing rate basis, and yet refuse to establish a *lower rate* basis for the same service on the grounds that the nature of the service, the operating conditions under which it must be performed, and the effect

of the proposed rate on the carriers, the public, and other shippers are such that a lower joint rate is not "necessary or desirable in the public interest."

It is claimed that when the packers induced the Commission not to permit the cancellation of the rate the Commission was somehow trapped, that it lost its power to pass upon the issues raised by Swift's complaint and had no alternative but to establish the lower rate sought by Swift. The argument, in effect, is that the Commission thus recognized it to be physically possible to set a car of livestock at Swift's proposed facility, and, therefore, that the administrative body was forced by some automatic compulsion to substitute for the approved rate the lower rate for that service which is sought by Swift, and to do so notwithstanding any other considerations whatsoever. Swift is obliged to try to give the case this strange twist because it cannot deal with the facts which underlie the Commission's determination.

In its appraisal of the demands made by Swift the Commission considered and weighed not only the special services and preferred treatment which the livestock would require in the Ashland Avenue Yards because of its highly perishable character and the speed with which it must be handled, but also the interferences, delays and disruptions which that service would necessarily impose upon the whole terminal operation in the stockyards area. The request was that joint rates, not in excess of the line-haul rates to Chicago, be established for application to deliveries of livestock at Swift's proposed receiving pens. Under the terms of the Interstate Commerce Act it thus became necessary for the Commission to determine whether the proposed joint rates would be necessary or desirable in the public interest. (49 U. S. C. Sec. 15(3)) The manner in which the proposed delivery would affect

the numerous other interests served by the Junction and the line-haul carriers was therefore a matter of major importance in the proceeding before the Commission, and in its findings, the Commission accorded proper weight to that factor.

In addition to the plain mandate of the statute, this Court, in the previous attempts by Swift and Armour to compel the carriers to effect a "readjustment of their rate schedules" on livestock (312 U. S. at 201), made it altogether clear that the interests of other shippers and receivers of freight cannot be disregarded. As the Court stated; "*the Commission was justified in considering, as it did, all that would account for the evolution of the practice complained of, as well as the effect of existing and proposed practices on the interest of the carriers, the public and other shippers. Adams v. Mills, supra, at 409, et seq.; Atchison, T. & S. F. Ry. Co. v. United States, 295 U. S. at 198, et seq.; Armour & Co. v. Alton R. Co., supra, at 201. Neither the railroads nor the Stock Yards exist for the benefit of the packers alone. Their patronage is large and important, but neither in the regulation of the carriers nor in the regulation of the Stock Yards are they entitled to facilities or treatment that will ignore the existence of other interests.*" (316 U. S. at 226-27, italics added). The Commission did not ignore the existence of other interests and its finding that delivery of livestock to Swift's private tracks at the flat line-haul rates would adversely affect those interests is overwhelmingly supported by the undisputed evidence discussed above. (R. 77, 81)

The record before the Commission also shows, and the Commission found, that the Junction has never been called upon to make private track deliveries of livestock to any of the Chicago packers. (R. 60) Swift and the other packers had elected in return for a large participation in the

profits of the Yard Company to receive their livestock only at the public yards "so long as the yard company maintained its business in Chicago." (316-U. S. 216 at 228-30) Entirely apart from that fact, however, delivery of the stock at the public yards was faster, more efficient and economical and therefore took a lower rate. As the Commission pointed out in *Chicago Livestock Exchange v. A. T. & S. F. Ry. Co.*, 197 I. C. C. 463:

"Centralized delivery has been found to be advantageous to both the carriers and the livestock industry." (p. 466)

Consequently, the Commission's finding that the published switching charge was not unreasonable or otherwise unlawful is not at all inconsistent with its failure to permit the cancellation of the rate over the protest of the packers. In its report, the Commission stated:

"The published switching charge is appropriate for any switching that may occur of cars of livestock to complainant's proposed plant. It does not appear that the maintenance of a switching charge for livestock will have any detrimental effect upon terminal operations." (R. 80-81)

This finding is a recognition of the undisputed fact that the Junction's switching charge for private track delivery of livestock has never been used.

As Swift states (Brief, p. 11) it has for some years received its direct shipments of livestock at the Omaha plant pens outside of the stockyards area. Since the flat line-haul rates apply to such deliveries, Swift considers this method of delivery preferable to receipt at the public yards or at its plant in the stockyards area. But the fact that Swift prefers to take its directs at the Omaha plant pens does not in any manner impinge upon the lawfulness of the charge applicable to the delivery of its directs at its plant

in the stockyards area or convert that charge into a "penalty." We doubt that it would be possible to add anything to Swift's own defense of this difference in the two charges as stated in its brief in the *Hygrade* case where it was specifically involved. (Appendix A)

The result of the Commission's decision, therefore, is to leave in effect a rate basis which the evidence shows, and the Commission found, to be lawful and proper in all respects, but because there are alternative and more-attractive facilities available to the packers for the receipt of their direct shipments, it is also a rate basis that will not be used, in all probability, except, as in the past, in case of emergency. Swift's argument that the Commission's decision makes "neither good sense nor good law" (Brief, p. 59) is thus predicated on the unreal assumption that the packers will now utilize a rate basis which has been in existence for generations but which they have never before utilized. The Commission found to the contrary and the evidence of record sustains that finding. (R. 60) Furthermore, the assertion of an inconsistency between the Commission's findings in the I. & S. proceeding and its findings with respect to Swift's complaint presents matters which this Court has repeatedly held to be outside the scope of judicial review. In *Western Chemical Co. v. United States*, 271 U. S. 268, Mr. Justice Brandeis, on behalf of a unanimous Court, stated:

"The objections presented here in brief and argument were addressed mainly to the soundness of the reasoning by which the Commission reached its conclusions. *It was urged that these are inconsistent with conclusions reached by it in similar cases; that the findings are inconsistent with some views expressed in its report in this proceeding; that some evidence was improperly considered; and that inferences drawn from*

some of the evidence were unwarranted. *These objections we have no occasion to discuss. The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law.*" (p. 271, italics added)

See also *Georgia Comm. v. United States*, 283 U. S. 765 at 775 and *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 at 75-76 (concurring opinion by Mr. Justice Brandeis).

It should also be noted that Swift's brief in the *Hygrade* case stressed the "demoralizing" effect upon transportation in and about the stockyards area that would result from plant door delivery to the Hygrade plant as a particularly persuasive reason why the Commission should sustain the switching charge. (Appendix A, pp. 47, 48-52) Consideration of those same factors in this case and the same result as Swift urged in the *Hygrade* case is now said to be "neither good sense nor good law." (Brief, p. 59)

In support of its argument with respect to Sections 3(1) and 2 of the Act, Swift pretends to rely upon a comparison between the charges applicable to dead freight delivered by the Junction, livestock delivered at the Union Stock Yards by the line-haul carriers, and the charges which would apply to the delivery service sought by it.<sup>1</sup> (Brief, pp. 63-80) As the evidence shows, and the Commission found, the measure of service rendered shipments of livestock is

<sup>1</sup> Although Swift purports to rely on Secs. 1(9), 1(10), 1(11), 2, and 15(5), its complaint before the Commission did not raise those issues, and they cannot, therefore, be raised here. *United States v. Capitol Transit Co.*, 338 U. S. 286 at 291; *United States v. Baltimore & Ohio R. Co.*, 231 U. S. 274 at 297-98; *Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510 at 526.

substantially greater than that accorded dead freight. (R. 65) Swift's acknowledgment of this indisputable fact in its brief in the *Hygrade* case was as follows:

"Necessarily, any system of transportation which has been evolved for the handling of livestock into and out of a market such as the Chicago live stock market, including the packing companies which are adjacent to and form a part of said market, must be so constructed as to furnish the type of service demanded by probably the most perishable type of traffic handled by the railroads." (Appendix A, p. 35)

This Court has recognized the vital dissimilarities between the transportation characteristics of dead freight and livestock and the substantially higher degree of service which must be accorded the latter. In the prior *Swift* case, the Court stated:

"This transportation is of a special kind of property on the hoof, which calls for special handling in the interests of economy, safety, sanitation, and health." (316 U. S. 216 at 227)

The "special handling" which the proposed operation would entail is fully apparent from the fact that livestock on short time would have to be received, classified and "dug out" from between cars of dead freight, constantly flowing into the Yards, which now require over 31 hours for delivery through the Ashland Avenue Yards under the present terminal practice unimpeded by the presence of "a special kind of property on the hoof." (R. 74)

Swift insists that it is discriminated against if livestock is denied what it calls "equal treatment" (Brief, p. 76) in the Ashland Avenue yards, knowing perfectly well that the perishable nature of that traffic, the expedited service which it requires, and the mandate of the 28-hour law, would force the carriers to accord that commodity not

equal service, but preferred service, and to do so at the sacrifice of all other traffic in the terminal. In every metropolitan area there are terminal facilities which, like the public stock yards,<sup>1</sup> are designed for the handling of a particular type of traffic. In Chicago, for example, there are special facilities for the unloading of ore, automobiles, fresh produce, coal, express matter, LCL and other commodities. Ore cannot be given what Swift calls equal treatment in the stock yards, or coal at the automobile docks, or LCL in the produce terminal, but such special facilities available only for the commodities for which they are designed are recognized to serve the public interest and have never been deemed discriminatory because the governing conditions are essentially different.

The Commission also found that the line-haul rates on livestock, prescribed by it, were not intended to compensate the carriers for the type of delivery sought by Swift (R. 60, 78-9) and the cost studies introduced by the carriers show that the terminal allowance included in those rates would be wholly inadequate for delivery of livestock by the Junction. (Exs. 50-52, R. 952-70, 1856-67) Livestock delivered to the Union Stock Yards is not handled by the Junction, and therefore does not require the difficult and costly service that deliveries to Swift's private track would entail. We have described in detail, as does the Commission in its report, the operation which would be necessary in working Swift's livestock through the Junction's Ashland Avenue Yards after delivery by the line-haul carriers to that road. That operation, in its entirety, is foreign to deliveries at the Union Stock Yards. With regard to the contention that deliveries to the Union Stock Yards were accorded preferred treatment, the Commission found:

"The transportation services, conditions, and cir-

<sup>1</sup> This Court stated in *Adams v. Mills*, 286 U. S. 397: "That the yards are in effect, terminals of the railroads is clear. They are in effect used as terminals and necessarily so" (p. 409).

cumstances connected with deliveries by the line-haul carriers at the unloading chutes of the Union Stock Yards, as hereinbefore described, also are substantially dissimilar from the private track delivery sought.”  
(R. 78)

This finding is abundantly supported by the evidence of record and it destroys any pretended reliance upon a comparison between the charges applicable to deliveries at the Union Stock Yards and deliveries of livestock at Swift's private track.

Swift's attempt to support its assertion of a violation of Sections 3(1) and 2 by reference to the charges applicable to delivery at the Union Stock Yards produces certain statements which fully demonstrate the difficulties under which it labors. The first such statement which we desire to call the Court's attention to is as follows:

“Moreover, and this is of the essence here, at least 37% of the livestock consigned to the Union Stock Yards *arrives there* in consolidated trains (*i. e.*, intermingled with dead freight), so that switching and ‘set outs’ are necessary to get that livestock to the Union Stock Yards. See 274 I. C. C. at 561-562. Yet neither the Union Stock Yards nor their consignees are subjected to the \$39.24 a car switching charge in respect of that 37% so switched.” (Memorandum for Appellant in Opposition to the Motions to Affirm, p. 6, italics added)

This representation, made in substantially the same form throughout Swift's brief (pp. 38, 40, 55, 65, 71), is contrary to the facts. In the first place, livestock does not arrive at the Union Stock Yards in consolidated trains. The consolidated trains to which Swift refers consist of dead freight and livestock which are not “intermingled”, the

dead freight being grouped behind the engine while the livestock makes up the rear part of the train. (R. 487) The livestock is left standing on the running track, the dead freight is cut off from the train and placed in the Ashland Avenue Yards. The engine thereafter returns to the running track, couples onto the livestock, and proceeds to the public yards. (R. 487-89) The train which arrives at the Union Stock Yards does not therefore contain cars of dead freight. Those cars are set out at the Junction's yards. Furthermore, that operation does not in any degree involve the switching or setting out of livestock as Swift asserts. It is the dead freight and not the livestock that is set out at the Ashland Avenue Yards. As stated by the Commission at the pages referred to by Swift in the above quote:

“In a consolidated train the dead freight is on the head and behind the engine. The cars of livestock are cut off and left standing at the eastern end of the east-bound running track while the line-haul carrier's engine sets the dead freight on one of the nine receiving tracks in the south yard. This operation blocks the running track until the engine returns and hauls the livestock into the Union Stock Yards.” (R. 63)

In short, the livestock now carried in consolidated trains does not receive any switching service by reason of its inclusion in such trains. So far as the handling of the livestock is concerned, the movement is precisely the same as that involved in exclusive livestock trains except that the livestock cars stand on the running track while the dead freight is being interchanged with the Junction in its Ashland Avenue Yards.

Immediately following the matter quoted above, Swift states:

“Furthermore, considerable switching of livestock takes place earlier, since—*although the Commission*

*significantly fails to advert thereto*—it is the fact that even the trains destined to the Union Stock Yards which consist of livestock exclusively are made up at the several line-haul carriers' break-up yards from mixed trains arriving at Chicago." (Memorandum For Appellant In Opposition To The Motions To Affirm, pp. 6-7, Brief, p. 65, italics added)

In connection with the italicized portion of the above statement, we quote from the Commission's report as follows:

"The following operation over the Chicago, Rock Island & Pacific Railway Company, hereinafter called the Rock Island, is typical of the operation over other line-haul carriers entering the stockyards area from the east. Consolidated trains containing livestock and dead freight, arrive at that carrier's Burr Oak Yard, 14 miles from the Ashland Avenue yards. At Burr Oak yard, the cars of livestock and dead freight are separated, and cars of livestock consigned to the Union Stock Yards are hauled directly to the latter yards by a Rock Island switch engine without passing through the Ashland Avenue yards." (R. 70)

The Commission did not fail to "advert" to the fact that livestock arrives at the carriers' outer yards in trains containing livestock and dead freight, and it described fully the process by which livestock is separated from the dead freight and made up into trains for movement to the Union Stock Yards. What Swift fails to point out, however, is the fact that that operation is performed with respect to all livestock regardless of whether it moves to the public yards or to Swift's Omaha plant pens, and the same operation would be necessary in connection with delivery to Swift's proposed plant. That service is a recognized part of the line-haul movement. It does not even remotely resemble the "very expensive, very difficult" and "impossi-

ble" (Appendix A, pp. 47, 50) delivery service which Swift seeks in this proceeding.

An additional statement, cut from the same cloth as those noted above, is the assertion that delivery to Swift's proposed stockyards is "the identical service by the same carrier" as that involved in delivering livestock to the Union Stock Yards. (Brief, p. 2) Swift thus represents to the Court that delivery to its proposed plant by the Junction through the Ashland Avenue yards is the "identical service by the same carrier" as the delivery made by the line-haul carriers directly to the public yards without interchanging that traffic with the Junction.

The evidence in this case, discussed above and in the Commission's report, establishes clearly and without contradiction the utter dissimilarity between the two, and we respectfully submit that the statement referred to is entirely unjustified and contrary to the facts.

Swift's claim of a violation of Section 2 (Brief, 69-80) is predicated wholly on the fact that the Junction's switching charge does not apply to deliveries at the public yard by the line-haul carriers while it does apply to livestock funneled through the Junction's Ashland Avenue Yards and delivered by that terminal road. The short answer to this is the following finding by the Commission:

"The transportation services, conditions, and circumstances connected with deliveries by the line-haul carriers at the unloading chutes of the Union Stock Yards, as hereinbefore described, also are substantially dissimilar from the private track delivery sought." (R. 78)

Nowhere in its discussion of Section 2 (Brief, pp. 69-80) does Swift specifically refer to this finding which completely defeats its claim. It should also be noted that the applicable rates to the Union Stock Yards apply equally

to all shippers of livestock including Swift and its competitors, and the Junction's switching charge also applies to all private track deliveries of livestock by it, including deliveries to Swift and its competitors. Swift's complaint is not that its competitors utilize a rate basis inapplicable to it but that the Commission refused to accord it a rate basis that is not available to its competitors. As stated by the Commission in *Richfield Oil Corp. v. Central R. Co. of N. J.*, 232 I. C. C. 505, in connection with a similar claim:

"Complainant has not shown or contended that it could not have shipped over the routes accorded the 19-cent rate. A showing of inequality between shippers over the same line is necessary to prove discrimination." (p. 505)

It would seem elementary that there can be no inequality between shippers when the rate complained of is equally available to all shippers as it is here. *Philadelphia Commercial Traffic Mgrs. v. B. & O. R. Co.*, 104 I. C. C. 173 at 177; *American Warehousemen's Assn. v. Inland Waterways Corp.*, 188 I. C. C. 13 at 17. In other words, Swift's claim of discrimination is based upon a situation in which there is a precise equality in the rates available to Swift and its competitors.

So far as the claim of a violation of Section 1(9) is concerned, that issue, as we have pointed out above, was not raised by Swift in its complaint before the Commission and is therefore not present here. *United States v. Capitol Transit Co.*, 338 U. S. 286 at 291; *United States v. B. & O. R. Co.*, 231 U. S. 274 at 297-98; *Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510 at 526. Furthermore the record shows and Swift admits that the switch connection required by that section is constructed, maintained and operated. It is the measure of the published charges for delivery of livestock via that switching connection

of which Swift complains. As Swift recognized in its complaint before the Commission, that matter is governed by other provisions of the Act, and the Commission found that the present charge complies with each of those provisions cited and relied upon by Swift at the time that it invoked the Commission's jurisdiction. (R. pp. 53-54)

As authority for its demands in this proceeding and in support of practically every argument made by it, Swift cites *United States v. Baltimore & O. R. Co.*, 333 U. S. 169, in which this Court upheld the action of the Commission.

In that case (hereinafter sometimes referred to as the *Cleveland case*) the carriers serving Swift's plant at Cleveland, had for many years delivered livestock at Swift's private track at the flat line-haul rates and the same service had been accorded other packers at Cleveland. *Swift & Co. v. Baltimore & O. R. Co.*, 266 I. C. C. 55 at 58. As the Commission pointed out, that had been the practice at Cleveland since 1910. (266 I. C. C. at 59) These deliveries of livestock were made by the line-haul carriers in the same manner as livestock is presently delivered to Swift at its Omaha plant pens in Chicago. In Chicago, livestock deliveries to the packers at their plants in the stockyards area would have to be funneled through the Junction's yards for delivery by that terminal carrier. Such deliveries have never been attempted by that road, and as the Commission found, the line-haul rates to Chicago prescribed by it, do not encompass that type of service. (R. 79)

In 1935, the stock yards, which owned a segment of the track used to make deliveries of livestock at Swift's Cleveland plant, demanded a payment equal to its yardage charges on each car of livestock delivered to Swift. The carriers refused to pay this charge and consequently discontinued deliveries of livestock to Swift's plant. (333

U. S. at 173-74) At the same time, however, the carriers *continued to deliver livestock to Swift's competitors in Cleveland* whose plants were served without use of the track owned by the stock yards. (333 U. S. at 174-75) In other words, Swift at Cleveland was seeking a continuation of the service which had been accorded that company for many years and was currently accorded other packers; in fact, the New York Central's tariff continued to provide for such deliveries to Swift at the flat line-haul rates. (333 U. S. at 174)

The situation at Chicago is the precise reverse of that which existed at Cleveland. At Chicago, it is Swift which seeks a type of delivery service which is different from the long custom and usage in Chicago, and is not accorded any other Chicago packer. Here Swift contends that the Commission erred in considering the rights of the other Chicago packers to demand the same privileges which might be granted to Swift.

With respect to deliveries of livestock to Swift's competitors at Cleveland whose plants were reached without the use of track owned by the Stock Yards, the Commission found that the transportation services, circumstances and conditions were substantially the same as those involved in making deliveries to Swift. (266 I. C. C. 55 at 68) In the present case, the Commission found that deliveries of livestock at points which take the line-haul rates to Chicago (deliveries to the public yard, and to Swift's Omaha plant) were substantially dissimilar from those involved in making delivery to Swift's proposed facility. The sole issue involved in the Cleveland case was defined by this Court on appeal as follows:

"Ownership of track 1619 by Stock Yards and its objection to livestock deliveries is, in fact, the only reason suggested for the railroads' failure to deliver

shipments of livestock to Swift *as they do to neighboring packers*, and for their failure to provide switching connections for livestock shipments." (333 U. S. at 175)<sup>1</sup>

The Commission thus held that since the New York Central's tariff provided for delivery of livestock to Swift at the line-haul rates, a charge which Swift was ready and willing to pay, Swift was entitled to that service. This Court affirmed the Commission's decision.

In the present case, Swift is unwilling to pay the published charges for the delivery which it seeks, and asks instead, for a rate basis that is conclusively shown to be non-compensatory with respect to such delivery service to Swift's proposed facility. This record thus presents no issue which is even remotely similar to that presented by the Cleveland case.

In the Cleveland case the Commission refused to permit the Stock Yards Company to destroy the historic custom of delivering livestock at that point and this Court sustained its action; in this proceeding, the Commission sustained the long existing terminal custom at Chicago. The decision in the Cleveland case does not impeach, but sustains the Commission's action here.

The argument which appears at pages 90-104 of its brief reflects Swift's position that in its rate determinations the Commission may not consider the physical conditions under which the traffic moves and the consequent operations which the carriers must perform in according the service which the rate covers. In its report, the Commission referred to and considered the congested conditions

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<sup>1</sup> Swift pretends to challenge the statement that, in the *Cleveland* case, "the defendant carriers continued to perform that service for appellant's competitors while refusing it to appellant." (Brief, p. 87, footnote 12.) We respectfully refer the Court to the italicized portion of its decision in that case.

in the Junction's Ashland Avenue Yards and the stockyards area in general, and necessarily so. It is in that area and through those yards that Swift seeks private track delivery of its livestock and the physical circumstances under which such traffic would move is, therefore, of vital importance.

Operating conditions encountered in the movement of the traffic involved are always considered by the Commission in determining the lawfulness of the transportation charges applicable thereto and necessarily so. Congestion and other like factors affecting the character of the service and the measure of the rates necessary to compensate therefor have been considered in countless cases. *St. Louis Chamber of Commerce v. B. & O. R. R. Co.*, 57 I. C. C. 639 at 646; *Illinois Brick Co. v. Director General*, 73 I. C. C. 215 at 217; *Illinois Brick Co. v. Director General*, 102 I. C. C. 64 at 66; *Mississippi Valley Iron Co. v. C. & N. W. Ry. Co.*, 104 I. C. C. 243 at 245-46; *Carload Traffic In Chicago District*, 174 I. C. C. 111 at 116; *Sonken-Galamba Corp. v. Chicago & A. R. Co.*, 181 I. C. C. 229 at 247; *Switching Fruits and Vegetables at Baltimore, Md.*, 201 I. C. C. 689 at 695 and 697. It would be novel indeed, if the Commission were required to appraise the lawfulness of the charges for a particular movement without regard to the physical conditions under which the service is performed. If the Commission were to ignore, as Swift suggests, the congested traffic in and around the Ashland Avenue Yards, it would accord no weight to the fact that the receiving and classification tracks in those yards are used to capacity for dead freight, that any livestock moving through those yards must be received and classified on those same tracks, that that short time livestock would be mixed in with cars of dead freight that now require more than 31 hours for the movement through those yards and would have to be "dug out" for special treatment, that the entire switching operation in those yards would be revolutionized

and that the effort to deliver this livestock would preclude proper service to the dead freight and producers' stock. All of these facts derive wholly or in part from the extreme congestion in and around the Ashland Avenue Yards, and it is not possible to appreciate the service demanded by Swift without reference to that vital operating condition.

The suggestion that the Commission's report has the effect of assessing "the entire cost of the congestion" against livestock is wholly untenable. (Brief, p. 93) In its report the Commission considered in detail the services that Swift's livestock would require in a movement through the Ashland Avenue Yards and it is those "very expensive, very difficult" and "impossible" services (Swift's Brief in the *Hygrade* case, Appendix A, pp. 47, 50) that justify the Junction's switching charge in all respects. What Swift proposes is that the cost of that service, peculiar to livestock, should be assessed against the shippers of dead freight.

With respect to the Commission's finding that any attempt to receive, classify and deliver Swift's livestock through the congested Ashland Avenue Yards would considerably delay and burden defendants' operations, Swift asserts that this is "an amazing conclusion which necessarily generates disbelief even on its face." (Brief, p. 100) It is said that 20 cars of livestock per day could not possibly have that effect. We respectfully refer the Court to our previous discussion of the evidence which shows in detail the disastrous consequences of any attempt to funnel livestock on short time through the overcrowded Ashland Avenue Yards. (*Supra*, pp. 54 to 64) As we have pointed out Swift did not undertake to question this evidence in any manner and it abundantly supports the Commission's findings. In this connection, the record in the *Hygrade* case shows that the volume of direct shipments to Swift's

competitor was less than one-half of the present volume of Swift's directs. (I. C. C. Docket No. 24375, Ex. 24) In that case, Swift advised the Commission as follows:

"In this connection the complainant [Hygrade Company] may state that its business is so small as to make no particular effect upon the method of handling livestock into the Chicago livestock market. It is doubtful if this is true \* \* \*." (Appendix A, p. 36)

In other words, the effect of intermingling any livestock in those congested yards would be so drastic if the stock were to be protected from injury and yet handled with the necessary speed that less than ten carloads per day would, Swift asserted, "absolutely demoralize transportation in or about the stockyards." (Appendix A, p. 48) But the Commission's finding that Swift's much larger volume would have that same effect "generates disbelief even on its face."

Swift argues that private track delivery by the Junction of the direct shipments of livestock consigned to Swift and the other Chicago packers would not disrupt and interfere with terminal operations in the stockyards area because there have been periods in the past when the movement of livestock to the public yards exceeded the present volume of that traffic. (Brief, p. 100) As the Commission stated in its report (R. 71), there were fewer cars of livestock going to the Union Stock Yards at the time of the hearing than there were at certain periods in the past, but the fact Swift ignores is that that livestock is not and never has been handled by the Junction. The livestock consigned to the Union Stock Yards moves from the outer yards of the line-haul carriers directly to the unloading chutes at the public yards over the Junction's main running track, and it is not funneled through the Junction's receiving and classification facilities. (R. 493) On the

other hand, delivery to Swift's proposed facility would involve receipt, classification and delivery by the Junction through its Ashland Avenue Yards, and it is that feature of the delivery service sought by Swift that would interfere with, and disrupt the terminal operations of the Junction and all other carriers operating in the stockyards area. In this connection the significant fact is that the traffic handled by the Junction in its Ashland Avenue Yards, the same yards through which Swift proposes to move its livestock, has increased tremendously. (R. 501, 950) The record in this case shows that during the years 1945, 1946 and 1947, the Junction handled through its Ashland Avenue Yards, an average of 726,144 cars, loads and empties (R. 465), and that there are 499 industries served solely by that road. (R. 443) In 1922, at the time of its report in the *Chicago Junction Case, supra*, the Commission stated:

"Besides serving the stockyards and Packingtown, the Junction performs terminal service for all the carriers in reaching the Central Manufacturing district, which as an institution has been in existence for about 15 years and has 180 industries, producing a tonnage of over 100,000 carloads per year and 100,000 tons per year of less-than-carload freight." (71 I. C. C. 631 at 633)

It is thus obvious that during the years in which there has been a decline in the movement of livestock to the public yards, the volume of traffic moving through the Ashland Avenue Yards and handled by the Junction has multiplied, and it is through those congested yards that Swift proposes to funnel its livestock. What Swift suggests is that the substantial flow of livestock which remains should be taken off the running track over which the traffic has declined and turned into the already saturated Ashland Avenue Yards

laboring under a greatly increased burden of traffic. In its report, the Commission noted the same spurious argument advanced by Swift, stating:

"Complainant contends that any disruption of operations would be the result of inefficiency, and that this is indicated by the fact that in the past there were times when the movement of livestock to the stockyards was much greater than the present movement. There can be longer trains and greater movements of livestock by the line-haul carriers to the stockyards, but the conclusion is warranted that a substantial movement of livestock by the Junction would adversely affect efficient and expeditious terminal operations generally and that operations would be disrupted if much of the large movement of livestock to the stockyards area and the return movement of the empty cars, were performed by the Junction." (R. 71)

Confronted with overwhelming proof that a complete breakdown in the terminal service in the stockyards area would attend its proposal, Swift now purports to state advice as to the manner in which these terminal operations should be conducted. (Brief, pp. 106-17) Swift has a number of employees in its operating department, sometimes called yardmasters (R. 1034), whose duties have to do with the handling of Swift's traffic in the Ashland Avenue Yards. In that work, they are "associated with the Chicago Junction" (R. 1034) and they spend their entire time in that yard. Although the hearing was held in Chicago and there was every opportunity to offer rebuttal, Swift found it impossible to call any of those men as witnesses, or otherwise to offer testimony that its proposal is practical or even possible. As shown by its brief in the *Hygrade* case, Swift recognizes that its proposed operation is a practical impossibility. (Appendix A, pp. 45-52) In

view of the proof and its own admission that an effort to deliver direct shipments of livestock to private yards would be disastrous to every interest involved, Swift now finds it necessary to attack the Junction's efficiency.

The best possible proof of the efficiency of that road is that it is actually doing its real job effectively and to the satisfaction of those who have always depended upon it for service. In a greatly restricted space in a densely developed district, it has successfully handled the increasing business that has come to it through an intensification of the industrial activity in that area. Swift's complaint is that the Junction is not able to supply an entirely new and different service which the developments of eighty years, in which Swift played a major role, have made it impossible to render. Swift fully appreciated this at the time that it opposed the Hygrade Company's request for plant door delivery of livestock by the Junction, stating: "All of the railroad facilities in and about the stock yards have been constructed to conform with the practice of delivering all incoming live stock direct to the loading and unloading chutes of the Union Stock Yards and Transit Company." (Appendix A, pp. 48-49) Notwithstanding the long custom and usage under which the Junction has never been called upon to handle livestock, and the conditions which have come into existence, in conformity with and as a result of that fact, Swift argues that the Junction's inability now to change those immutable physical conditions is evidence of its inefficiency.

This assertion of inefficiency is predicated in part on a claim that the Junction's motive power is inadequate, which is based entirely upon a count of the engines on the Junction. It completely ignores the fact that many of the units in service in 1948 were capable of a much higher tractive effort than those in service in 1922 and that the units disposed of since

1922 were replaced by engines that are more efficient and better suited to the operating needs of the Junction. (Ex. 58, R. 1963-65) In other words, the changes made in the type and quality of locomotives coupled with the revised operating practices described in exhibit 58 (R. 1963-65) have produced a substantial increase in the operating efficiency of the Junction. So far as the decrease in the number of locomotives is concerned, that same trend has characterized the transition from steam to diesel power on all of the rail carriers. Diesel power has enabled the carriers to reduce the number of units owned by them, and at the same time it has improved their ability to meet their line-haul and switching requirements. With respect to this same period of time, statistics published by the Commission show that the number of locomotives owned by all of the roads has declined from 69,414 in 1923 to 44,474 in 1948. (Thirty-Seventh Annual Report on the Statistics of Railways in the United States, 1923, p. XVI; Sixty-Second Annual Report on the Statistics of Railways in the United States, 1948, p. 14) Figures for the same two years with respect to the Junction are 77 and 47. (Ex. 58, R. 1963-65) The percentage decrease on the Junction is therefore approximately the same as that on the roads as a whole. Furthermore, the same statistics show that all of the railroads owned a total of 8,981 diesels in 1948, constituting twenty percent of the total while the Junction's diesels (in that same year 12) amounted to more than twenty-five percent of the total number of locomotives (47) operated by it. (R. 466) Swift's preoccupation with numbers is, therefore, utterly meaningless.

The nature of Swift's efforts to support its claim of inadequate motive power is adequately characterized by the following statement:

"For the Superintendent of the Chicago Junction

testified that that carrier did not have sufficient *engines* to take care of all of the industrial placement of cars (Tr. 422)," (Memorandum for Appellant in Opposition to the Motion to Affirm, p. 8, Brief, p. 107, *italics added*)

The testimony thus referred to is as follows:

"Q. Have you sufficient *Diesels* to take care of all of the industrial placement of cars?

"A. No, sir, no, sir, we have not." (R. 524)

The statement that the Junction does not have a sufficient number of *diesels* to do all of its industrial placement work is thus converted into an assertion that that road does not have sufficient *engines* to perform that service. As the record shows, there are 24 steam locomotives, in addition to the 12 diesels, that are suitable for and are used in the industrial placement of cars. (R. 466-67)

Despite the enormous increase in traffic moving through its Ashland Avenue Yards, the Junction has handled and continues to handle that traffic as promptly and expeditiously as possible. As stated by witness Kinsella, Superintendent of the Junction, in response to interrogation by Swift's counsel:

"Q. But granting that that is true the inability to handle it as promptly as you might desire would be due either to lack of motive power or lack of tracks or both?

"A. I don't quite understand your question. *We are handling it now.*" (R. 526)

The Junction has not, however, undertaken to acquire and maintain, on a standby basis and subject always to Swift's command, the facilities that would be required to effect plant door delivery of livestock to the packers in the stockyards area. Throughout the period of intensive in-

industrial development in that area, the packers chose to enrich themselves by becoming partners in the public yards and insisted with that purpose in view that livestock be delivered in this area only at that point. As a result, the entire development of the transportation and industrial facilities in the stockyards area has been geared to the long established and customary practice of delivering livestock at the public yards and interchanging dead freight with the Junction for delivery to the various industries. As early as 1922, the Commission recognized and Swift, a party to the proceeding, conceded that livestock could not be handled in any other way:

"The movement of livestock in and out of the Junction yards is essentially different from the method of handling dead freight, in that each carrier moves its trains to the unloading chutes with its own power, and goes into the pens for outbound stock destined for its own line. All parties concede that that is the only practical method of handling that traffic." (*Chicago Junction Case*, 71 I. C. C. 631 at 633)

The Junction's facilities have developed in conformity with those historical facts, and it has not been possible to reserve, subject to Swift's call, the terminal facilities required to meet that packer's present demands.

Swift refers to an agreement made to avert a threatened strike by the Junction's employees as one which "a carrier chooses to sign." (Brief, p. 111) It does not require a long memory to recall that Swift's management has recently entered into agreements with its organized employees which its executives probably do not regard as altogether a matter of choice. Swift may not like the Junction's agreement with its employees or, for that matter, its own, but what conceivable action the Commission should or could take with reference thereto is not explained. Practically

every operating practice in the railroad industry is governed by agreements between the roads and their employees negotiated and arrived at pursuant to the provisions of the Railway Labor Act. Followed to its logical conclusion, Swift's argument that operations which conform to collective bargaining agreements must be disregarded would require the Commission to ignore all operating conditions and circumstances and to pass upon the lawfulness of rates without the slightest consideration of the transportation services actually involved.

Still struggling against the undisputed evidence which shows that the proposed operation cannot be performed, Swift finds it necessary to inveigh against the fact that trains handling both livestock for the public yards and ordinary freight for interchange with the Junction in its Ashland Avenue Yards cannot take the entire train into the unloading chutes at the public yards. (Brief, p. 112)

Swift offers no suggestion as to what would be done with the dead freight in the public stock yards while the livestock was being unloaded and of course there is no place at that livestock terminal for the storage of dead freight.

In its Exceptions to the Examiner's Proposed Report, Swift advised the Commission that the "operations on the Junction could be improved" by requiring the line-haul carriers to interchange all freight with the Junction in its Ashland Avenue Yards, including all the packers' directs (37,500 loads, 75,000 loads and empties) and the producers' stock (46,000 loads, 92,000 loads and empties). (Swift's Exceptions to the Examiner's Proposed Report, pp. 120-121)

In short it was suggested that the way to fix the Junction so that it could handle the great volume of direct shipments of livestock was to double the burden by adding thereto all the producers' stock consigned to the public yards. Swift thus proposed that the line-haul carriers should be barred from operating over the Junction's tracks (including running

track 1103) except for the purpose of interchanging traffic with that switching line in its Ashland Avenue Yards. This matter has apparently been given some further consideration and the opinion now offered is exactly the reverse of that tendered to the Commission. It is now suggested that the Commission should have required the Junction to accord trackage rights to its 27 connecting lines and that all deliveries of livestock to the packers on their private tracks should be made by those connecting carriers without interchanging that traffic with the Junction. (Brief, pp. 112-13) In other words, the proper way to relieve the congestion on the Junction's tracks is to multiply by 27 the number of carriers making deliveries to the industries served by the Junction. It would be difficult to decide which of these two contradictory suggestions is the more fantastic.

In connection with what it characterizes as "the heart of the case," Swift argues that the Commission, by its decision, undertook to enforce a covenant between the Union Stock Yards and the New York Central, which purportedly requires operation of the Junction in such a manner as to accord special advantages to the Union Stock Yards. The agreement to which Swift refers was introduced by its own counsel in the closing minutes of the hearing before the Examiner. (R. 1038-39) It has no relation to the issues raised by the complaint before the Commission and neither the carriers nor any of the other parties who opposed Swift's complaint have at any time sought to justify the charges under attack by reference to that covenant. We respectfully submit that Swift cannot identify a single finding by the Commission which is in any manner dependent upon the covenant to which it refers.

In its report, the Commission considered Swift's own reliance upon the agreement in question and stated:

"The operation of the Chicago Junction is subject

not only to the provisions of the Interstate Commerce Act but also to the conditions imposed by the Commission in the *Chicago Junction Case, supra*.<sup>1</sup> These conditions were particularly intended to insure that the Chicago Junction and Chicago River & Indiana should be operated as neutral terminal carriers, without special advantage favoring the New York Central but the conditions were and are broad enough to inhibit operation of the Chicago Junction to the special advantage and interest of the Union Stock Yards." (R. 80)

It is thus plain that the Commission did not, as Swift charges, undertake to enforce the covenant in question, but instead, held the covenant ineffective insofar as it might be construed to require the Junction to accord special advantage to the Union Stock Yards. Apparently, Swift's position is not that the covenant must be neutralized and held ineffective but on the contrary that it must be construed to require line-haul carriers who were never parties to the covenant to perform a transportation service for Swift at rates substantially less than those found to be reasonable and lawful in every respect.

The letter written by Counsel for the Yard Company to the New York Central and River Road appears to reflect the Yard Company's apprehension that in this case, as in most rate cases brought by large shippers, potential traffic pressure might be brought to bear upon individual carriers in an effort to affect their participation in the defense of the case. Swift conceded at the hearing that prior to the date of this letter the operating officers of the Junction had advised their executives that the Junction could not handle livestock through its Ashland Avenue Yards without completely disrupting the operation of those Yards. (R. 1039)

<sup>1</sup> The Commission retained jurisdiction of that proceeding for the purpose of making such amendments or modifications of its conditions as might become necessary or desirable in the public interest. (71 I. C. C. 631 at 641)

**CONCLUSION.**

The railroad interveners respectfully pray the Court to affirm the decision of the lower court.

Respectfully submitted,

KENNETH F. BURGESS,

DOUGLAS F. SMITH,

MARTIN M. LUENTE,

*Counsel for Railroad Intervenors.*

SIDLEY, AUSTIN, BURGESS & SMITH,  
*Of Counsel.*

APPENDIX A

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BEFORE THE  
**Interstate Commerce Commission**

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HYGRADE FOOD PRODUCTS CORPORATION

vs.

ATCHISON, TOPEKA & SANTA FE  
RAILWAY COMPANY et al.

Docket No. 24375.

BRIEF ON BEHALF OF INTERVENER, OMAHA PACKING COMPANY.

ROSS DEAN RYNDER,  
WILLIAM N. STRACK,  
*Attorneys for Intervener.*

Chicago, March 12, 1932.

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BEFORE THE  
**Interstate Commerce Commission**

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**HYGRADE FOOD PRODUCTS CORPORATION**

vs.

**ATCHISON, TOPEKA & SANTA FE  
RAILWAY COMPANY et al.**

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Docket No. 24375.

**BRIEF ON BEHALF OF INTERVENER,  
OMAHA PACKING COMPANY.**

**STATEMENT OF THE CASE.**

This is an action brought by complainant, a packing company located in the stock yards district of Chicago, Illinois, on the rails of a terminal switching carrier, Chicago Junction Railway Company. The complainant seeks to obtain delivery of incoming live stock at the chutes of the Union Stock Yards & Transit Company at Chicago, without charges other than the through Chicago rate, plus \$2.70 per car, and also the receipt of live stock direct at its plant without charges other than the through Chicago rate plus \$2.70 per car. In seeking to obtain this relief, complainant contends, first, that the other charges being made for either service are unrea-

sonable and that under section 1, it should be entitled to this relief. It further asserts that because these other charges are being made to complainant, while no charges, other than \$2.70 per car, are being made to intervenor, a packing plant located two and one-half miles north of the stock yards district, on the rails of the Chicago, Burlington & Quincy Railroad Company, there is a violation of both sections 2 and 3 of the Interstate Commerce Act. Intervenor is only interested in the allegations of complainant that any services being rendered for intervenor, or any charges in connection therewith, are either discriminatory or prejudicial in connection with services and charges to complainant. Therefore, the following presentation is being made solely with respect to the alleged violations of sections 2 and 3 of the Interstate Commerce Act in so far as they relate to intervenor.

## ABSTRACT OF EVIDENCE.

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### TESTIMONY ON BEHALF OF INTERVENER, OMAHA PACKING COMPANY.

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W. C. WATSON, a witness called on behalf of intervener, Omaha Packing Company, testified in substance as follows:

He is assistant to the Freight Traffic Manager of Swift and Company and its subsidiaries (309).

#### Qualifications of Witness.

For twenty-eight years he has been in the Transportation Department of Swift and Company, a greater portion of which time he was assistant to the Freight Traffic Manager and specialized in rates, rules and regulations pertaining to stock yards and the transportation of live stock. Omaha Packing Company is one of the subsidiaries of Swift and Company and all its transportation matters are handled by Swift and Company. Witness particularly looks after matters pertaining to live stock of the Omaha Packing Company.

#### Location and Character of Business Done by the Omaha Packing Company.

The Omaha Packing Company is a corporation incorporated in the State of Kentucky and operates a packing plant at Chicago, Illinois, slaughtering principally hogs. It is located at 2320 South Halsted Street (310), which is slightly in excess of two miles north of the Union Stock Yards. It is located on the tracks of the Chicago, Burlington & Quincy Railroad Company. It is not

reached by the tracks of the Chicago Junction Railway Company. It is one of the industries of the Chicago, Burlington & Quincy Railroad Company here in Chicago.

**Source of Live Stock Shipped to Omaha Packing Company.**

The Omaha Packing Company obtains its live stock, and has for a good many years, from direct shipments from various country points, the location of which depends upon the market supply of live stock and other items which normally enter into the purchasing of live stock. It never buys any live stock at the Union Stock Yards (311). In the event it did, it would be necessary to either reload the live stock and switch it to the Omaha Packing Company plant at a charge of  $2\frac{1}{2}$  cents per hundred pounds, minimum 60,000 pounds, or virtually \$15.00 per car, or drive the live stock approximately two and one-half miles north on Halsted Street to the plant of the Omaha Packing Company. The purchase and loading of live stock into cars would involve a substantial delay. It would probably be an over-night move from the Stock Yards to the plant of the Omaha Packing Company.

Halsted Street, between the plant of the Omaha Packing Company and the Union Stock Yards, is strictly a business thoroughfare upon which there are double street car tracks, and in addition to the street cars, many trucks and automobiles pass along this street. Also, many automobiles and trucks are parked from time to time along the curbs of the street. There are a number of stop and go lights at various corners (312). The character of the adjoining property is strictly business and industrial. The traffic on Halsted Street is very heavy.

**Municipal Ordinances of Chicago, Restricting the Driving of Live Stock on Public Streets.**

Witness has made an investigation of the city ordinances respecting the driving of live stock in the streets of Chicago. Section 977, of the Revised Code of Chicago—1931, provides:

“No person or persons shall, between the hours of seven o'clock A. M., and seven o'clock P. M., of each and every day, drive upon or along any public street or alley within the city more than five head of cattle at any one time. Any person who shall violate the provisions of this section shall be fined not less than ten dollars nor more than one hundred dollars for each offense.” (313)

Section 3936 of the Revised Code of Chicago—1931 provides:

“No person having the charge, custody or control thereof shall permit any horse, mule, ass, ox, cow, goat, pig or other like animal to go loose or at large in any of the public ways in the city; and the running at large within the limits of the city, except in inclosed places on private property, of poultry, chickens, hens, turkeys, ducks, geese, and other like fowl is hereby declared to be a common nuisance and the same is hereby prohibited. Any person owning, in charge of, or having the custody or control of such animals or fowls that shall permit the same to run at large contrary to the provisions of this section shall be subject to a fine of not more than ten dollars for each offense.” (314)

Irrespective of the question of city ordinances, it would not be a practical proposition to drive live stock two and one-half miles north on Halsted Street to the Omaha Packing Company.

**Rail Movement of Live Stock Destined to Omaha Packing Company.**

None of the live stock purchased by the Omaha Packing Company, even though not purchased at the Union Stock Yards, moves to the Union Stock Yards. Ship-

ments destined to the Omaha Packing Company are billed direct from either country shippers or its own shippers from stations located on various lines of railroad, including the Chicago, Burlington & Quincy. From stations on all lines other than the Chicago, Burlington & Quincy, the Omaha Packing Company pay a terminal charge of \$2.70 as is assessed at the Union Stock Yards. From points on the Chicago, Burlington & Quincy the delivery is made free, the same as is made to all industries located on its rails, and as published in C. B. & Q.—I. C. C. 17660.

The Omaha Packing Company has six switch or spur tracks leading from the main line of the Chicago, Burlington & Quincy. Four of these tracks are used for incoming dead freight and outgoing fresh meat and packing house products. The westerly two tracks are used solely for unloading live stock. Between these tracks is an unloading platform about 11 feet, 8 inches wide, and about 496 feet 6½ inches long. The platform is closed in at the north end and has sides consisting of a series of sliding slatted doors. The platform has room for eleven cars on one side and twelve cars on the other. Because the sides consist of these sliding doors, cars can be spotted at any place on the tracks and an opening made at the door of the car. At the south end of this platform, the Omaha Packing Company maintains a first-class standard live stock scale, quite similar to scales maintained at public stock yards.

When live stock arrives at this unloading platform, it is unloaded by employes of the Omaha Packing Company, driven a short distance to the scale at the south end of this platform, where it is weighed on this scale, owned by the Omaha Packing Company, by an employe of the Omaha Packing Company. A representative of the Western Weighing & Inspection Bureau checks all

weighing done by the Omaha Packing Company. In addition to that, the scale is checked daily by employes of the Omaha Packing Company, and at least twice a year the scale is checked by representatives of the City of Chicago. No notice is given the Omaha Packing Company of the time of these inspections.

The live stock is then driven from the scale to the holding pens owned and maintained by the Omaha Packing Company. The unloading platform is likewise owned and maintained by the Omaha Packing Company (317).

No firm or corporation, including all of the railroads which enter the City of Chicago, the Union Stock Yards and Transit Company of Chicago, or the Chicago Junction Railway Company, furnish any yarding, unloading, weighing, driving or holding of live stock in pens after unloading, in connection with any live stock received by the Omaha Packing Company at its plant other than the Omaha Packing Company itself. There is no service of yarding, unloading, weighing, driving or holding performed even by the Chicago, Burlington & Quincy Railroad Company.

**Basis of Freight Rates Paid by Omaha Packing Company.**

The basis of the freight rates now paid by the Omaha Packing Company for the receipt of live stock by rail was prescribed by the Interstate Commerce Commission in *Omaha Packing Company v. C. M. & St. P. Ry. Co.*, 37 I. C. C. 378, in which the charge of \$2.00, in addition to the line-haul rate on live stock to Union Stock Yards, Chicago, Illinois, was prescribed on all shipments of live stock not originating on the lines of the Chicago, Burlington & Quincy Railroad Company. On shipments originating on the Chicago, Burlington & Quincy, the rates prescribed were the line-haul rates to Chicago, Illinois, without the addition of the \$2.00 terminal charge.

The subsequent percentage increases and reductions have changed this \$2.00 terminal charge to \$2.70.

The Omaha Packing Company has been in its present location, to the best of the knowledge of witness, from fifty-five to sixty years which precedes the time when it became a subsidiary of Swift and Company.

**Facilities Maintained by the Omaha Packing Company for Holding of Live Stock.**

The Omaha Packing Company has forty-seven pens for the holding of live stock. The pen capacity is approximately 8000 head of hogs. The killing capacity of the plant is 4500 hogs per day (318).

**Receipt of Direct Shipments by Swift and Company at Union Stock Yards.**

Swift and Company receives direct shipments of live stock at the Union Stock Yards in substantial quantities. When it does receive such direct shipments of live stock the service charges, etc., are exactly the same as those which have been described by witnesses for the Hygrade Food Products Corporation. There is no difference in the service charges and the terminal charges.

## ARGUMENT.

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### INTRODUCTION.

The intervener, Omaha Packing Company, is directing its argument solely to the allegations of violations of Sections 2 and 3 of the Interstate Commerce Act, insofar as said allegations affect said intervener. We shall show; first, that the rates and charges in effect on shipments of livestock destined to the plant of the Omaha Packing Company have been fixed by the Commission and are, therefore, both legal and reasonable; second, that because of vastly different circumstances and conditions, no discrimination, prejudice or preference, prohibited by law, exist. Therefore, the Commission should dismiss that part of the complaint based upon alleged violations of Sections 2 and 3 of the Act.

### RATES APPLICABLE ON LIVESTOCK TO INTERVENER'S PLANT FIXED BY COMMISSION.

This is not the first time the Commission has had before it the rates on livestock destined to the plant of intervener. In *Omaha Packing Company v. C. M. & St. P. Ry. Co.*, 31 I. C. C. 378, a complaint was filed by the Omaha Packing Company attacking the rates being charged it by the carriers on shipments of hogs destined to its plant. At the time the complaint was filed the Milwaukee was absorbing \$4.00 of the \$6.00 switching charge of the Burlington, on whose rails the Omaha

Packing Company is situated. For a period from January 12, 1913 to April 6, 1913, the Milwaukee refused to absorb any part of the \$6.00 switching charge. The Omaha Packing Company sought a through rate to its plant on the basis of the Chicago rate. It appeared that on shipments to the Chicago Union Stock Yards there was a terminal charge of \$2.00 per car. The Commission found that the rates charged were unreasonable to the extent that they exceeded the rates to Chicago plus the charge of \$2.00 per car. The reasonable rate prescribed was the Chicago rate plus \$2.00 per car. Since that time the percentage increase and reductions have changed this \$2.00 per car rate to \$2.70 per car (T. 138). Therefore, intervener is now paying rates fixed by the Commission in 1915. By reading the report of the Commission in that case, it will be seen that conditions were substantially the same then as they are now. Therefore, the finding of the Commission fixing a lawful rate to intervener's plant should apply equally at the present time.

#### **ALLEGED VIOLATION OF SECTION TWO.**

The complaint alleged that the defendants were violating section 2, by discriminating against it in favor of intervener. Although no formal announcement was made that it was abandoning this allegation, complainant has completely failed to prove any violation of section 2. The only facts proved by complainant, which could possibly apply to a section 2 case, were that both complain-

ant and intervener had shipped livestock from some of the same origin points. However, the evidence clearly shows that these shipments to complainant were consigned to it either at its plant at 3830 S. Morgan Street, Chicago, Illinois, or at the Chicago Union Stock Yards, both on the rails of the Chicago Junction Railway Company. The evidence shows that the shipments to intervener were consigned to its plant at 2320 S. Halsted Street, Chicago, Illinois, being located on the rails of the Chicago, Burlington & Quincy Railroad Co. Under these facts there could not possibly be a violation of section 2.

Section 2 of the Interstate Commerce Act provides:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The decisions under this section may be summarized as holding that in order to show a violation of section 2,

It is incumbent upon a complainant to practically prove that the carrier or carriers have charged the favored shipper less than the published rate while charging complainant the published rate for the same identical transportation, in other words, that the carriers are guilty of giving a rebate.

Respecting the elements of a case under section 2 of the Interstate Commerce Act, the Supreme Court said, in *Interstate Commerce Commission v. B. & O. R. Co.*, 145 U. S. 263, 36 L. ed. 699, 703:

"For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburg; but if A agrees not only to go, but to return by the same route, it is no injustice to B to permit him to do so for a reduced fare, *since the services are not alike*, nor the circumstances and conditions substantially similar, *as required by Section 2 to make an unjust discrimination*" (italics ours).

Again on page 705 of the law edition, the court stated:

"In order to constitute an unjust discrimination under Section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.' To bring the present case within the words of this section, we must assume that the transportation of ten

persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible."

In *U. S. v. Delaware, L. & W. R. Co.*, 40 Fed. 101, 103, in discussing sections 2 and 3, the court stated:

"The former (section 2) relates to unjust discrimination in rates. The latter (section 3) is comprehensive enough, standing alone, to include every form of unjust discrimination, not only in rates, but also in the conveniences and facilities supplied to shippers in any of the details of the carrying service."

In *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.*, 57 Fed. 1005, Circuit Judge Taft (later Chief Justice of the Supreme Court) held that the furnishing of free cartage in Grand Rapids and refusing to do so in Ionia was not a violation of section 2. When the case got to the Supreme Court, the assistant attorney general abandoned any claim of violation of section 2 (see *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.*, 167 U. S. 633, 42 L. ed. 306.)

The same question has come before the Commission in numerous cases. There have, however, been few findings of violations of section 2. In order to clearly illustrate that complainant has not made out a case under section 2, we shall quote from a few of the decisions of the Commission.

In *East Springfield Citizens' Club v. Am. Ry. Exp. Co.*, 68 I. C. C. 482, the only question involved was an alleged violation of section 2, because defendant furnished delivery service to certain parts of the city of Springfield, Mass., i. e., Park and Franconia sections, and did not furnish it to the East Springfield section. Because in many respects that case is quite clearly analogous to the case here presented to the Commission, we are quoting extensively from said decision. On page 483, the Commission stated:

"Complainants do not allege that the failure of defendant to extend its free collection and delivery limits to the East Springfield section is unreasonable, but merely that it is unjustly discriminatory under section 2 of the act. In *Interstate Com. Commis. v. B. & O. Railroad*, 145 U. S. 263, 281, the Supreme Court of the United States said:

In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.'

"It becomes necessary, therefore, to consider whether the 'kind of traffic' of the East Springfield section is 'like' the traffic of the Park and Franconia sections, and whether the transportation would be 'under substantially similar circumstances and conditions.' As before stated, the principal express

traffic in East Springfield which would receive the benefit of the desired free collection and delivery service is that of the manufacturing concerns, parties to the complaint. During the first six months in 1921 it is shown that there were 2,767 outbound and inbound shipments from and to East Springfield, over 2,500 of which were for the Westinghouse Electric & Manufacturing Company and the Rolls-Royce company alone. The shipments of the Westinghouse Company consist principally of small motors, electrical appliances and parts, the average weight being about 130 pounds. The express traffic of the Rolls-Royce company is principally inbound and consists of automobile head lamps and delicate automobile parts. The average weight of these shipments is not shown. The shipments of the Storms Drop Forging Company consist of forgings and dies averaging about 54 pounds. The character of the traffic of the other complaining plants is not disclosed. The traffic of the Park and Franconia sections is chiefly to and from householders, the shipments of the Diamond Match Company and the small chemical manufactory being the only important exceptions. The average weight of the shipments of these sections is materially less than in the case of East Springfield.

“From the Union Depot the present free collection and delivery limits extend 1.9 miles in the direction of East Springfield. The Springfield Tool Company, the most distant manufacturing plant in that section, is 3.1 miles beyond these limits, or 5 miles from the depot. The most distant house in the Park and Franconia sections is 3.6 miles from the depot. All told, there are approximately 370 families in East Springfield as compared with 3,777 families in the

Park and Franconia sections. The testimony indicates that the density of residences in the latter section is probably not substantially greater than in East Springfield, but defendant states that while it holds itself out to deliver and collect in the Franconia section, no such service has, as a matter of fact, been rendered during the past three years.

"The service of free collection and delivery is performed in the Park section with a 2-ton truck driven by one man. Defendant estimates that to collect and deliver the heavier shipments of the East Springfield section would necessitate the acquisition of a 3.5-ton electric truck, requiring a driver and helper. At the present time several of the complaining plants perform the service with their own trucks in connection with other hauling.

"Upon this record we find that it has not been shown that the express traffic to and from the East Springfield section is 'like' that to and from the Park and Franconia sections, within the meaning of that word as used in section 2 of the act; and that the free collection and delivery of express shipments in the East Springfield section, as compared with such service in the Park and Franconia sections, would not be 'under substantially similar circumstances and conditions.' As aforesaid, the reasonableness of the practice of defendant in refusing to extend its free collection and delivery limits to the East Springfield section is not in issue."

In the instant case, complainant has made no showing at all as to the amount of traffic to intervener so that it may be compared with the traffic to complainant to see if the traffic is "like". Also there has been absolutely

no proof of the fact that the transportation was "under substantially similar circumstances and conditions." The record clearly shows that any movement to complainant at either its plant or at the Chicago Union Stock Yards must move over the Chicago Junction Railway Company, which has no part in the transportation to the plant of intervener. While the service rendered by the Chicago Junction is described in great particularity by witness O'Brien, on pages 246 to 271 of the transcript, giving the difficulties of both the service to the Chicago Union Stock Yards and the service requested by complainant at its plant, there is no evidence of the details of the service rendered in a movement to intervener's plant after it leaves the break-up yards, so it would be impossible to prove any similarity, even if the hurdle of the independent switching carrier, the Chicago Junction, could be jumped by complainant. In view of the decisions of both courts and the Commission, however, it seems that that fact alone would make section 2, and probably section 3, inapplicable.

In *Providence Fruit & Produce Exchange v. R. I. Co.*, 69 I. C. C. 422, the Commission held that failure of defendant to absorb switching charges of an electric line while absorbing switching charges of connections on competitive points was not a violation of section 2. In that connection the Commission stated, on page 424:

"The unjust discrimination prohibited by section 2 is in *movements over the same road or roads*, and *not over different roads or partly over the same road and partly over different roads*" (italics ours).

A substantially similar question was before the Commission in *Rates on Bunker Coal*, 73 I. C. C. 62. One of the questions was whether the fact that different rates apply on coal to piers for unloading into vessels and coal to industries or team tracks within the terminal district was a violation of section 2. The Commission held, on page 75, that the two classes of movements are not made "under substantially similar circumstances and conditions" of carriage.

In *Lehigh Portland Cement Co. v. Director General*, 62 I. C. C. 231, 234, the commission held that failure to do spotting, switching, etc., without charge on a system of tracks, in and about complainant's plant, of 2.96 miles, all owned by complainant, was not a violation of section 2, even if defendant performed free spotting in instances where the tracks were owned by defendant.

That case is very close to the case now before the Commission, because the contemplated direct delivery to the plant of complainant would involve considerable switching and spotting of cars, done entirely on tracks owned by complainant, and within its plant. Deliveries to intervener's plant do not involve any switching or spotting, as intervener's plant is directly adjacent to the right of way of the Chicago, Burlington & Quincy Railroad Company, and is served direct from the tracks of that railroad.

The Commission recently decided in a somewhat similar case that there was no violation of section 2. In *Dor-*

*chester Board of Trade, Inc., v. N. Y., N. H. & H. R. R. Co.*, 179 I. C. C. 423, it was alleged that failure to include that part of Boston, known as Dorchester, and served by the Neponset Station, in the switching limits of Boston, violated section 2 because other parts of Boston were included. The Commission found that there was no violation of section 2. The facts there, in respect to a violation of section 2, were quite similar to the facts in the case now before the Commission. The object of the complaint in that case was to get an absorption of switching in that part of the Dorchester district, served by the Neponset Station. That is the object of complainant here. There complainant felt it had made a case under section 2, because the territory served by other stations, i. e., Harrison Square, Harvard Street, etc., received free switching. In holding that there was no violation of section 2, the Commission established a precedent which is controlling in this case.

It is possible that complainant may urge that *Richmond Chamber of Commerce v. S. A. L. Ry.*, 44 I. C. C. 455, 466, affirmed in *Seaboard Air Line Ry. Co. v. U. S.*, 254 U. S. 257, is authority for a finding that the existing practice of non-absorption of switching charges of the Chicago Junction is a violation of section 2. As indicated, both in the decision of the Commission and the decision of the Supreme Court, the evidence must come within certain narrow confines to warrant such a finding. The Commission clearly predicated its decision on the following findings:

“Where the short delivery service within the

switching district is *substantially the same in either instance*, we are of the opinion that the line-haul carrier is receiving a greater compensation from one shipper than from another for a like service when it absorbs the switching charges of one switching line and not those of another" (italics ours).

The Commission then continued:

*"We do not consider that the carriers must absorb the switching charges indiscriminately to all industries within the switching limits of Richmond if they choose to absorb the switching charges to any one industry off their rails. The illegality herein found to exist is the receiving of a greater compensation for one service than for a like service under substantially similar circumstances and conditions"* (italics ours).

There is absolutely no showing of "a like service under substantially similar circumstances and conditions" in this case. The complainant utterly failed to make proof of the character of the service rendered in respect to either movements to complainant's or intervenor's plants. The defendant, Chicago Junction, gave in great detail the difficult and complex service involved in a switching movement to complainant's plant. We shall go into this question more in detail later in this argument, where we shall point out the absolute dissimilarity of circumstances and conditions which make both sections 2 and 3 inapplicable to this case. Furthermore, as we shall later indicate in connection with the section 3 allegations, complainant has failed to prove the amount, if any, of the switching absorption on shipments to intervenor's plant.

**REFUSAL OF CHICAGO JUNCTION TO DELIVER CARS TO  
COMPLAINANT'S PLANT NOT A VIOLATION OF SECTION  
THREE.**

We now come to the allegations of violations of section 3. In that connection there are three possible aspects: (1) the refusal of the Chicago Junction to deliver livestock at complainant's plant; (2) requiring complainant to pay yardage charges on all livestock received by it through the facilities of the Chicago Union Stock Yards Company; and (3) refusal of the line haul carriers to absorb the switching charge of the Chicago Junction in case shipments are made direct to complainant's plant. We shall discuss these three aspects in order.

The refusal of the Chicago Junction to switch cars of livestock to complainant's plant may or may not be a reasonable practice under section 1, but clearly it has no place in the section 3 aspect of this case. The evidence clearly shows that the Chicago Junction is not a party in any way to the delivery of livestock to intervenor. Intervenor is an industry on the Burlington Railroad (T. 311). Complainant is located solely on the Chicago Junction (T. 80). No other railroad is closer than a mile or possibly two miles (T. 111). According to the testimony of its general manager, (T. 248 to 271, inclusive) the Chicago Junction should not be required to deliver livestock direct to complainant's plant. He gave numerous reasons not only why it is not reasonable, but even went further, stating such a proposition is impossible from a practical operating point of view. However,

that is the argument of the Chicago Junction and does not concern intervenor, except as a basis for possible refusal of railroads to deliver direct to intervenor's plant.

In the refusal to deliver direct to complainant's plant, only the Chicago Junction is concerned and the other railroads, which take part in any movement to intervenor's plant, have no connection with it. The Commission has repeatedly held that there can be no undue prejudice under section 3, unless it be within the power of the carrier charged with causing the undue prejudice to remove it by its own act.

This is clearly shown in *Richmond Chamber of Commerce v. S. A. L. Ry.*, 44 I. C. C. 455, 462, 463, where the Commission held there was no violation of section 3 under somewhat similar circumstances. The only difference there was that the prejudiced point was on the rails of the C. & O., a line-haul carrier, while here the alleged prejudiced point is on the rails of a purely switching carrier. In that case the Commission stated:

"We have expressly said that there can be no undue prejudice within section 3, unless it is within the power of the carrier charged with the discrimination to do away with it by its own act."

In this case, if the line-haul defendants be charged with undue prejudice, and ordered to remove it, they cannot require the Chicago Junction to switch cars direct to complainant's plant. It is beyond their power. The

only thing they could do would be to refuse to participate in a delivery to intervener's plant. This, for reasons we shall later indicate, would be a most unreasonable requirement. The fault of the refusal, if a fault, is one of the Chicago Junction. Even if all the line haul defendants desired to participate in direct deliveries to complainant's plant, they are powerless to do so, because the plant is not on the line of any of them, but on a purely switching road.

There are other decisions of the Commission to the same effect. Some of them are given below:

*Ohio-Michigan Coal Cases*, 80 I. C. C. 663, 677.

*Peters Cartridge Co. v. Director General*, 73 I. C. C. 311, 313, 314.

*Wood, Iron & Steel Co. v. P. R. R. Co.*, 83 I. C. C. 503, 507.

We, therefore, believe the conclusion is reasonable, that the mere refusal of the Chicago Junction to make direct deliveries of livestock to complainant's plant does not make out a case of undue prejudice under section 3, merely because the Burlington Railroad makes delivery direct to intervener's plant in an entirely different section of Chicago.

Furthermore, the record conclusively shows that unless the line-haul carriers absorb the Chicago Junction switching charge of \$12.00 per car, the complainant does not want direct delivery of live stock to its plant. We say the record conclusively shows this because complain-

ant-attempted to have a total of 22 cars delivered direct to its plant (T. 58, 59). The record shows that none of these cars were so delivered because complainant refused to pay the Chicago Junction switching charge of \$12.00 per car (T. 66, 244, 293). If the action of the complainant in that respect has any meaning at all, it is that it is not interested at all in the bare question of delivery of live stock direct to its plant. It is only interested in direct delivery *if the line-haul carriers agree to absorb the incidental expense*, covering switching, spotting, etc., connected with it. Therefore, the question of direct delivery really is not in this case so far as either alleged violations of sections 2 or 3 are concerned. Actually the sole question presented is: Does the failure of the line-haul carriers to absorb the incidental expenses of switching, spotting, etc., in connection with direct deliveries to complainant, constitute a violation of either sections 2 or 3?

We have already discussed the section 2 aspect of the case. We shall later specifically discuss the section 3 aspect of the refusal of line-haul carriers to absorb the incidental expenses of switching, spotting, etc., under the heading, "Refusal of Line-Haul Carriers to Absorb Chicago Junction Switching Charge Not a Violation of Section 3."

### ESSENTIALS OF A CASE OF VIOLATION OF SECTION THREE.

The pertinent portion of section 3 reads as follows:

“(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

In connection with this section, the Supreme Court has repeatedly held that there must be a substantial identity of circumstances and conditions. In one of the leading cases, *Interstate Commerce Commission v. B. & O. R. R. Co.*, 145 U. S. 263, 36 L. ed. 699, the Supreme Court stated (see page 705 of the law edition):

“In this connection we quote with approval from the opinion of Judge Jackson in the court below: To come within the inhibition of said sections (2 and 3), the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage

to the other, in order to constitute unjust discrimination' ”.

It has been repeatedly held by the Supreme Court, and lower federal courts, that the mere existence of a preference or advantage in a particular case is not enough to bring it within the prohibition of section 3. Some of the cases so holding are:

*Texas, etc. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940.

*Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 42 L. ed. 414.

*Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co.*, 168 Fed. 161.

*Union Pac. R. Co. v. Updike Grain Co.*, 178 Fed. 223, affirmed 222 U. S. 215, 56 L. ed. 171.

*Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 141 Fed. 1003, affirmed 209 U. S. 108, 52 L. ed. 705.

In *Manufacturer's Ry. Co. v. U. S.*, 246 U. S. 457, 62 L. ed. 831, the Supreme Court held that section 3 did not denounce every preference and prejudice, but only those that are undue or unreasonable.

It has also been held that the question of what constitutes an undue preference or advantage under section 3 is not a question of law, but one of fact. In this connection, the Supreme Court stated in *Texas and P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940 (see page 947 of the law edition):

“The 3d section forbids any undue or unreason-

able preference or advantage in favor of any person, company, firm, corporation, or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions, not of law, but of fact. The mere circumstance that there is in a given case a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable. When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question."

This quotation is particularly pertinent where the court refers to the duty of the Commission to ascertain the facts. As we shall later indicate, there are lacking, due to failure of proof or otherwise, certain fundamental facts which must exist in order to prove a violation of section 3.

It has also been repeatedly held that, in determining whether an alleged preference is undue or unreasonable, the dissimilarity of the circumstances and conditions affecting the two contrasted classes of transportation are to be taken into consideration and may prevent the alleged preference from being undue or unreasonable. These decisions are:

*Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940.

*Wight v. U. S.*, 167 U. S. 512, 42 L. ed. 258.

*U. S. v. Atchison, T. & S. F. R. Co.*, 234 U. S. 476, 58 L. ed. 1408.

The foregoing general discussion of some phases of the construction of section 3 by the Supreme Court has a very important bearing upon the questions involved in complainant's allegation of undue prejudice under section 3. By way of summary, it may be said that the foregoing cases hold:

1. Every preference or advantage is not prohibited.

2. Only undue or unreasonable preferences or advantages are prohibited.

3. Whether a preference or advantage is undue is a question of fact.

4. The Commission must decide the question based on evidence of existing facts.

5. Facts must show a substantial identity of circumstances and conditions in order for a preference or advantage to be undue or unreasonable.

These principles should be borne in mind in the discussion which is to follow.

**COLLECTION OF YARDAGE CHARGES NO VIOLATION OF  
SECTION THREE.**

We do not know if complainant will seriously contend that, because it has been compelled to pay the Chicago Union Stock Yards a yardage charge in connection with its inbound shipments of live stock, there has been a violation of section 3. It is true that intervener did not pay, and never has paid, any yardage to said stock yards company. It is likewise true that none of its live stock moves through the Chicago Union Stock Yards (T. 311). The record clearly shows why that is. If its shipments were consigned to the stock yards, it would be necessary to reload them and switch them to its plant, involving substantial additional expense and delay (T. 312). It would be both impractical and illegal to drive the hogs along Halsted Street two and one-half miles north from the stock yards to intervener's plant. This is clearly established in the record (T. 312, 313, 314) and there is no testimony to the contrary.

The record shows that there is an ordinance in effect in the city of Chicago prohibiting the driving of more than five head of cattle along any public street. The word cattle has two meanings, one a broad meaning including all species of live stock, and the other a narrower meaning restricted to animals of the bovine family. In statutes or ordinances of the type referred to, the word cattle is usually held to mean all live stock (see *Mathews v. State*, 47 S. W. 647; *State v. Brookhouse*, 38 Pac. 862; *State v. Lawn*, 80 Mo. 241).

Even if this construction were not proper, another ordinance prohibits any and all live stock running loose on any public street. Loose, according to Webster's New International Dictionary, means, "not fastened." Obviously, it would be unlawful to drive hogs or other live stock along a public street in Chicago.

On shipments of complainant, the record shows that they are unloaded by the Chicago Union Stock Yards Company in and by means of facilities owned by said company and by employes of said company. Intervener has supplied its own facilities consisting of an unloading platform 11 feet 8 inches wide and 496 feet 6½ inches long. The platform is closed in at the north end and has sides consisting of a series of sliding slatted doors. Eleven cars can be unloaded on one side and twelve cars on the other (T. 317). The stock is unloaded by employes of intervener and driven to the scales by these same employes (T. 317).

Complainant's shipments are weighed by employes of the Chicago Union Stock Yards Company on scales owned by that company (T. 42). Intervener owns its own scales and does its own weighing (T. 317).

Complainant's live stock is yarded by the Chicago Union Stock Yards Company by its employes and in its pens (T. 40 and 41) with few exceptions. Intervener's live stock is driven by its own employes to holding pens, owned and maintained by it (T. 317).

The record is full of evidence that the Chicago Union

Stock Yards Company performs a substantial amount of service in connection with complainant's shipments of live stock. This was frankly admitted by complainant. Its only contention was that the service performed was really for the railroads and should be covered by the line-haul rate paid by complainant plus \$2.70 per car.

On the contrary, the record shows that no firm or corporation, including all the railroads entering Chicago, the Chicago Union Stock Yards Company, and Chicago Junction Railway Company, furnish any yarding, unloading, weighing, driving or holding of live stock in pens after unloading in connection with any live stock received by intervenor at its plant (T. 318). Not even the Chicago, Burlington & Quincy Railroad Company performs any service of yarding, unloading, weighing, driving or holding of live stock for intervenor (T. 318).

It is hard to imagine a greater lack of similarity of circumstances and conditions. In fact, they are absolutely dissimilar. Applying the facts to the positive requirements of a violation of section 3, as set forth by our Supreme Court in the cases hereinbefore cited, it will be found that there is absolutely no evidence of a violation of section 3, in respect to the charges for yarding, weighing, etc., by the Chicago Union Stock Yards Company.

**REFUSAL OF LINE-HAUL CARRIERS TO ABSORB CHICAGO  
JUNCTION SWITCHING CHARGE NOT A VIOLATION OF  
SECTION THREE.**

Under a previous heading "Essentials of a Case of Violation of Section 3", we have pointed out from decisions of the United States Supreme Court and other federal courts, the absolute obligations of a complainant in a section 3 case. Under that heading we summarized these essentials as follows:

1. Every preference or advantage is not prohibited.
2. Only undue or unreasonable preferences or advantages are prohibited.
3. Whether a preference or advantage is undue is a question of fact.
4. The Commission must decide the question based on evidence of existing facts.
5. Facts must show a substantial identity of circumstances and conditions in order for a preference or advantage to be undue or unreasonable.

We shall now discuss the facts as presented at the hearing and point out particularly wherein these facts fail to show any preference or advantage and that, in connection with any alleged preference or advantage, there is no such substantial identity of circumstances and conditions as to warrant a finding of a violation of section 3.

In that connection it must be borne in mind that it is not the duty of either the defendants or the in-

intervener to make out a case for complainant. The burden rests solely upon complainant. The rule is tersely stated by the Commission in *Biggs Boiler Works v. Erie R. Co.*, 171 I. C. C. 712, 714, as follows:

"The burden of proof rests on complainant to establish the existence of undue prejudice and preference."

We believe that the record shows that complainant has failed to make out a case of a violation of section 3, in so far as a comparison of movements to its plant with movements to the plant of intervener are concerned, for the following reasons:

1. Complainant is located on a purely switching line and intervener is an industry on a line-haul carrier.
2. Complainant is located at the Union Stock Yards, along with many other packers, all being adjacent to the Union Stock Yards & Transit Company, while intervener is two and one-half miles away in a different district.
3. Complainant desires free switching, spotting and holding of cars involved in a plant layout of privately owned tracks while intervener gets only a delivery on the tracks of the Chicago, Burlington & Quincy Railroad, on which intervener is an industry.
4. Complainant does not either own or have available facilities for unloading, weighing and handling incoming live stock while intervener owns ample facilities.
5. Operating conditions connected with the di-

rect delivery of live stock to complainant's plant are much more difficult than to intervener's plant.

6. Absorption of charges in connection with direct delivery to complainant's plant and the resultant direct delivery would demoralize live stock deliveries to the stock yards district of Chicago, while no such situation exists in connection with deliveries to intervener's plant.

7. There is no proof of the amount of the absorption by line-haul carriers in deliveries to intervener's plant.

8. Complainant has made no proof of damage by reason of the alleged violation of section 3.

9. The Commission has already recognized the substantial difference between the location of complainant and intervener.

We shall now briefly discuss each of these reasons, pointing out wherein the record supports these reasons and the conclusions naturally resulting therefrom.

**1. Complainant Is Located on a Purely Switching Line and Intervener Is an Industry on a Line-Haul Carrier.**

There should be no dispute of this point as the record clearly shows that complainant is located solely on the rails of the Chicago Junction Railway Company (T. 80). Intervener is an industry located solely on the tracks of the Chicago, Burlington & Quincy Railroad Company (T. 311). The Chicago Junction Railway Company does not participate in any movement of cars to the plant of intervener (T. 140).

2. Complainant Is Located at the Union Stock Yards, Along With Many Other Packers, All Being Adjacent to the Union Stock Yards & Transit Company, While Intervener Is Two and One-half Miles Away in a Different District.

The record shows that complainant is one of many packers located adjacent to the Union Stock Yards & Transit Company. Mr. O'Brien enumerated seventeen packing companies, all located similarly to complainant, both adjacent to the Union Stock Yards & Transit Company and on the rails of the Chicago Junction Railway Company (T. 277). This is the point where probably the greatest live stock market in the world is located. Necessarily, any system of transportation which has been evolved for the handling of live stock into and out of a market such as the Chicago live stock market, including the packing companies which are adjacent to and form a part of said market, must be so constructed as to furnish the type of service demanded by probably the most perishable type of traffic handled by the railroads. The record shows that the present system of receiving at the unloading docks of the Union Stock Yards & Transit Company all live stock consigned to either commission men or packers located in or adjacent to said stock yards, has been in existence since 1865 (T. 249). Mr. O. T. Henkle, Vice President and General Manager of the Union Stock Yards & Transit Company, gave a history of the development of this method of handling live stock (T. 209-226, inclusive). As indicated by this testimony of Mr. Henkle, the complainant desires to overturn a method of receiving live stock which has

been a part of and essential to the growth and operation of the Chicago live stock market. In this connection the complainant may state that its business is so small as to make no particular effect upon the method of handling live stock into the Chicago live stock market. It is doubtful if this is true, but even if it were, that is not the question which is here before the Commission. As we shall indicate in point 6 which will follow, there are many other packers receiving live stock direct under identical circumstances applicable to complainant and if complainant finds it of advantage to receive this live stock direct at its plant, and it has stated it intends to do so in the event the carriers absorb the switching charges, there will be many other larger packers who will demand the same thing.

The present method of handling shipments of live stock to the plant of intervener is likewise a situation which has existed for many years. Witness on behalf of the intervener testified that to his own knowledge the plant of the Omaha Packing Company has been in its present location for from fifty-five to sixty years (T. 318). He also testified that this plant had always received its live stock direct at its plant without going through the Union Stock Yards (T. 311).

As a matter of fact, we believe the plant of intervener existed possibly before the opening of the Union Stock Yards & Transit Company. That was probably the reason why intervener's plant was located some miles away

from the live stock market. During all that time it has been an industry on the line of the Chicago, Burlington & Quincy Railroad Company, receiving its live stock direct on the rails of that company. During the same period of years the packing companies located adjacent to the Union Stock Yards & Transit Company have been receiving their live stock at the unloading docks of said Stock Yards Company. Certainly, the history in connection with the facts alone finds ample justification for the finding that there is no substantial identity of circumstances and conditions. Delivery to intervenor's plant, in a different section of Chicago, is obviously substantially dissimilar to delivery to any part of the largest live stock market in the world.

3. Complainant Desires Free Switching, Spotting, and Holding of Cars Involved in a Plant Layout of Privately Owned Tracks While Intervener Gets Only a Delivery on the Tracks of the Chicago, Burlington & Quincy Railroad, on Which Intervener Is an Industry.

This is not a case where the defendant carriers are performing for another shipper the identical service requested by complainant. The record shows that in the contemplated direct delivery to complainant, use will be made of a system of purely private industrial tracks, the sole property of the complainant. In fact, an exhibit was placed in the record, exhibit No. 2, upon which these tracks are shown. It conclusively appears that these tracks are owned by complainant (T. 112). The record also shows that, in the performance of the service necessary in direct delivery of live stock cars to the

plant of complainant, it would be necessary for the Chicago Junction Railway Company to spot cars (T. 123, 268, 278, 279), use the Chicago Junction tracks for storage (T. 128-129), and perform the service of feeding, watering and resting live stock (T. 130). For example, in describing the manner of making the delivery contemplated by complainants, witness O'Brien testified that the Chicago Junction Railway Company would remove such cars as might interfere, would place the car at the unloading platform and chute designated for that particular kind of stock, complete its delivery, and then remove the empty car as soon thereafter as possible. It would be necessary to make such switches as were necessary. If there were more cars than the track would hold at one time (the record shows the track could handle but very few), there would be additional switching, cutting and spotting (T. 268). Again Mr. O'Brien testified that the entrance to the two tracks which the complainant contemplated using for unloading live stock is from the east whereas the traffic approaches from the west and the so-called tail track room is quite small being only five or six car-lengths. This would be a most awkward, expensive and poor switching arrangement, and one that no one would undertake to lay out for the prompt, proper and efficient handling of live stock (T. 278-279). As stated by Mr. O'Brien, the service could be performed if they stayed as it long enough (T. 279).

By way of contrast the record shows that intervener is located directly adjacent to the tracks of the Chicago,

Burlington & Quincy Railroad Company. There is absolutely no spotting or other intraplant service performed for intervener while it is quite evident that the absorption which complainant desires in this proceeding is the absorption of charges for services which will include intraplant spotting and switching service upon the industrial plant lay-out of complainant.

In *Tide Water Oil Co. v. Director General*, 58 I. C. C. 92, the Commission held there was no undue prejudice in refusing to absorb charges of an industrial switching road for switching and spotting cars at complainant's plant, although defendant did absorb the charges of this switching road on certain independent industries served by it. This latter absorption did not involve any intraplant spotting, while the service performed for complainant did involve intraplant spotting.

This case is very much in point in this proceeding. The record shows that intervener is on the rails of the Burlington and there is absolutely no intraplant spotting involved. If the direct deliveries requested by complainant were made by the Chicago Junction, it would require considerable intraplant spotting; in fact, the record indicates that the spotting and switching involved, and which the charge of the Chicago Junction would cover, is quite complicated and complex.

**4. Complainant Does Not Either Own or Have Available Facilities for Unloading, Weighing and Handling Incoming Live Stock While Intervener Owns Ample Facilities.**

Still another difference in the circumstances and conditions surrounding the delivery of live stock direct to complainant as compared with delivery direct to intervener is in respect to the facilities available for this service. The record shows a total lack of such facilities at the plant of complainant. Complainant has no unloading dock or platform (T. 82, 83); it has no scales at its Chicago plant (T. 84); it has no runway for the driving of live stock to its holding pens (T. 82); and the tracks upon which it contemplates the unloading of its live stock are now leased to the Mather Stock Car Company (T. 206). These tracks are now used for the storage of cars (T. 113).

On the other hand, the situation at the plant of intervener is entirely different. Intervener has provided, at its own expense, an unloading platform about 11 feet, 8 inches wide, and about 496 feet 6½ inches long. The platform is closed in at the north end and has sides consisting of a series of sliding slatted doors. This permits cars being spotted at any place on the tracks and an opening being made at the doors. At the south end of the platform intervener maintains a first class standard live stock scale, quite similar to scales maintained by public stock yards. The live stock is driven from the unloading platform over the scales by employes of intervener into

holding pens maintained by it (T. 317). Again, we find a substantial difference in circumstances and conditions.

**5. Operating Conditions Connected With the Direct Delivery of Live Stock to Complainant's Plant Are Much More Difficult Than to Intervener's Plant.**

Necessarily, in consideration of the question of whether or not failure to absorb switching charges is undue prejudice under section 3, the question of the comparative difficulty of the operating conditions involved in the two transportation movements is quite important. We contend that before complainant can prove any undue prejudice of itself or undue preference of intervener in respect to the absorption of switching charges, complainant must prove that there is a substantial similarity in the operations and conditions under which the live stock is handled to the plant of intervener as compared with the movement to the plant of complainant. This similarity must exist from the time the cars leave the hands of the road-haul carriers in their break-up yards.

In *Omaha Live Stock Exchange v. C. M. & St. P. Ry. Co.*, 69 I. C. C. 688, the Commission had before it a complaint which alleged among other things that the failure of the defendants to absorb the entire amount of the charges assessed by the terminal carrier for switching carload shipments of live stock to or from the public stock yards at Omaha was prejudicial to complainant and unduly preferential of competitive markets at other named points where defendants absorbed all switching charges on live stock to and from said public stock yards.

The Commission, in holding that there was no proof of a violation of section 3, stated on page 693:

"The record discloses no such substantial similarity in operations and conditions under which live stock is handled at Omaha and at the other markets that a finding of undue prejudice against Omaha can be predicated thereon. There is some testimony of a very general nature and expressions of opinion that conditions are similar, but the location of the public stockyards at the alleged preferred points and the physical operations incident to shipping live stock to and from them are not shown in any degree of detail."

In *Aurora, Elgin & Chicago R. R. Co. v. I. H. B. R. R. Co.*, 51 I. C. C. 331, the complainant, an electric line, was seeking relief from defendant's charges for switching cars to the connection with complainant's line. It was alleged that the rates charged violated sections 1, 2 and 3 of the Act. The violation of the latter section was because it listed complainant as an industry and treated it differently from other common carriers. After reviewing the evidence showing how expensive and difficult it was to perform the switching involved, and the larger volume of traffic in other interchanges, as compared with the amount interchanged with complainant, the Commission stated:

"Under the circumstances shown of record the complaint should be dismissed. The difference in charges is justified by the difference in circumstances affecting the cost of services rendered in connection with complainant's traffic and that of other connecting lines, respectively."

*Arizona Packing Company v. Director General*, 74 I. C. C. 387, involved an alleged violation of section 3 because the defendants failed to absorb switching charges at complainant's plant at Cactus, while absorbing such charges on shipments to packing plants located at the Union Stock Yards of Phoenix, which it was alleged was a competitive point. In respect to this allegation of undue prejudice the Commission stated (see page 388):

"The services rendered in connection with such shipments are essentially dissimilar from those rendered at complainant's plant."

That case is just the reverse of the present case. There, complainant was located away from the stock yards and here complainant is at the stock yards. The evident dissimilarity, however, exists in either instance.

The only evidence offered by complainant was of the type condemned by the Commission in *Omaha Live Stock Exchange v. C. M. & St. P. Ry. Co.*, *supra*, it being "testimony of a very general nature and expressions of opinion that conditions are similar". It is true complainant offered as a witness a man who had considerable experience in the operation of railroads. However, he had not been connected with any railroad since 1925 and gave absolutely no description of the movement of traffic from the break-up yards of any line-haul carrier to the interchange with the Chicago, Burlington & Quincy Railroad Company and, thence, over that line to the plant of intervenor. Apparently, the extent of his investigation of that phase of the operation was to make

a personal examination of the tracks at intervener's plant. He told about the two tracks which were adjacent to the plant of intervener, stating in respect to that, "a very nice lay-out" (T. 180). The balance of his testimony respecting the operations to intervener's plant was most general and purely opinions not backed up by any investigation or statement of facts or based upon any prior knowledge he may have had of the situation. Examples of some of these statements are as follows:

"Well, after the Chicago, Burlington & Quincy gets to the plant with their transfers in every instance the operation is simple enough. They run through a congested territory which is located down in the so-called lumber district and quite an operating problem to get down there and back. A lot of grade crossings, tracks on the streets" (T. 181).

Again he stated:

"In making deliveries from the Chicago, Milwaukee, St. Paul & Pacific, for instance, to the Chicago, Burlington & Quincy of stock for the Omaha Packing Company, they are liable to run across the same delays we would run across" (T. 198).

We have referred above to all the testimony there is in the record showing the details of the operations involved in the switching movement from break-up yards of line-haul carriers to the plant of intervener. It certainly is most general in character and it is difficult to see how such general, inconclusive and speculative testimony could possibly be the basis of any finding of violation of a provision of the Interstate Commerce Act. We believe that the record clearly justifies a finding that

there is no violation of either section 2 or section 3 of the Interstate Commerce Act, if for no other reason, because the complainant has failed to prove substantial identity of operating conditions in respect to the two movements here before the Commission.

However, the lack of proof of the details of the operations in a movement to intervener's plant is not the sole reason why there is no proof of a substantial identity of operating conditions. There was considerable and detailed proof of the operating conditions involved in a movement to complainant's plant. The witness produced by complainant testified, in relation to the switching at the plant "It is not quite as simple as the Omaha situation" (T. 183). In respect to the movement of live stock into the stock yards district, he testified that he had never seen anything more congested than the stock yards district at the time live stock was coming in (T. 187). He further testified that if a train stopped before getting to the unloading chutes of the Union Stock Yards & Transit Company, it would be quite a serious matter (T. 188). He further testified that from a point perhaps six or eight miles from the stock yards, stock destined to complainant's plant would have to pass through a very congested district and any stops to switch out cars within that six or eight miles would delay a great many trains and would be a very serious matter (T. 190). He further testified, "It would be a very difficult matter to switch those cars out" (T. 191). He further testified that if other packers in the same vicinity would demand

the same service, "That would be quite a problem, would be another problem" (T. 192).

Mr. O'Brien, General Manager of the Chicago Junction Railway Company further testified as to the difficulties involved in moving live stock direct to the plant of complainant. In that connection he stated, "It would be awkward and fruitful of delay, and expensive more than usual,—more than the ordinary handling of the business" (T. 249). He further testified in relation to the tracks of the Chicago Junction in the stock yards district, "I do not know of any place in Chicago where we find so many so-called foreign line crews moving over the tracks of another company" (T. 251). Further in connection with this district, he stated:

"It is closely built up, yes sir, and a highly developed industrial territory. We do move our traffic promptly but because of the intense industrial development there are a great many so-called cross movements from one district to another, and necessarily so; but the principal movement of traffic must be maintained at a high order, to avoid congestion and delay. We have that provided today in the present manner of conducting our business. That is the result of this present method of handling live stock has developed over a period of 66 years" (T. 251).

Mr. O'Brien also testified that, while it would not be impossible to deliver cars of live stock direct at the plant of complainant, providing they were equipped with proper unloading facilities, it would be very impractical

(T. 255). Mr. O'Brien further testified that the handling of live stock to the plant of complainant in the manner contemplated would be very expensive, very difficult and would undoubtedly affect the other perishable freight business of the Chicago Junction (T. 264).

As we shall indicate under point No. 6, which immediately follows, further operating difficulties would probably occur due to the fact that all other packers located in the stock yards district would demand the same sort of service here sought by complainant.

Not only do the facts before the Commission utterly fail to prove any similarity of operating conditions respecting the two switching movements but all the implications are to the contrary. The movement involved to intervenor's plant has been going on for years, apparently, without difficulty. As pointed out above, the basis of the charges now in existence to the plant of intervenor were prescribed by the Commission in *Omaha Packing Company v. C. M. & St. P. Ry. Co.*, 37 I. C. C. 378. From these facts it would be logical to assume that the movement of live stock direct to the plant of intervenor is no more difficult than the movement of any other freight to industries on the line of the Chicago, Burlington & Quincy Railroad Company or any other line-haul carrier. This method of handling has grown up through years and, no doubt, the facilities in the operations of the various carriers have been adapted to that method of handling. The contrary is decidedly true in respect to the

contemplated direct movement to the plant of complainant. The entire transportation system in and about the stock yards and adjacent packing plants has been constructed on the basis of delivering all live stock direct to the unloading chutes of the Union Stock Yards & Transit Company. According to the testimony in this case, any other method of handling would absolutely demoralize transportation in or about the stock yards. In view of these two situations, the conclusion is inevitable that there is no substantial similarity of circumstances and conditions respecting the operations in deliveries of live stock direct to the plant of complainant, as compared with deliveries of live stock direct to the plant of intervenor.

6. Absorption of Charges in Connection With Direct Delivery to Complainant's Plant and the Resultant Direct Delivery Would Demoralize Live Stock Deliveries to the Stock Yards District of Chicago, While No Such Situation Exists in Connection With Deliveries to Intervenor's Plant.

Another reason why the circumstances and conditions surrounding the transportation service being rendered to, or requested by, complainant, and that being rendered to intervenor, is because the absorption of switching charges in the stock yards district on live stock would completely demoralize the present system of handling live stock. As indicated above, the present method of handling live stock in the stock yards has been in force since 1865. All of the railroad facilities in and about the stock yards have been constructed to conform with the practice of delivering all incoming live stock direct

to the loading and unloading chutes of the Union Stock Yards & Transit Company.

Any finding by the Commission of violation of section 3 must have as its basis a finding that the circumstances and conditions surrounding the transportation of incoming live stock in the stock yards is substantially similar to the circumstances and conditions surrounding the delivery of incoming live stock at the plant of intervener. Because complainant is a part of a distinct district, known as the stock yards district, it naturally must partake of the advantages or disadvantages of being so located. In determining whether there is a substantial identity of circumstances and conditions, the Commission should not confine itself to the consideration of complainant alone but must also consider the other shippers engaged in like business and located in relatively the same position as complainant.

The record shows that complainant is not the only packer in the stock yards district which receives direct shipments of live stock. Practically all of them receive direct shipments (T. 260). In practically every train of live stock coming into the stock yards there are cars consigned direct to packers (T. 280).

Another witness testified that there are eight or ten others besides complainant who receive direct shipments (T. 286). One of these shippers receives nine times as many hogs direct as complainant, and another ten times as many, and, still another, four times as many (T. 287).

For the first six months of 1931, 1,425,892 hogs were received at the stock yards, consigned direct to the packing houses (T. 288). The total number of hogs received during that same period at the stock yards was 4,028,544 (T. 289). All of these packers to whom this live stock was consigned are located immediately adjacent to the stock yards and on the rails of the Chicago Junction Railway Company (T. 290).

According to the witness for complainant, the situation with respect to the delivery of live stock direct to all the other plants in the same neighborhood is identical to the situation with respect to the delivery of live stock to complainant (T. 108). Another witness testified that Swift and Company received direct shipments at the Union Stock Yards in substantial quantities. It received the same services and paid the same charges respecting these shipments as did complainant. There is no difference between the handling and the charges on Swift and Company's shipments and those of complainant (T. 319).

The testimony in the record is that, if receipt of live stock direct to the packing plant of complainant is of advantage to it, it will be of advantage to every one of its competitors. They will all have to have the same service (T. 270). This, according to the testimony of the General Manager of the Chicago Junction Railway Company, would increase the difficulties of operation to the point of making such deliveries impossible. In answer

to a question as to whether the delivery direct to the packers of their direct shipments would be possible, Mr. O'Brien stated:

"I view with a great deal of alarm any thought of that kind, because I know from the experience that I have had the difficulties already encountered in handling these heavy runs of live stock, and necessarily I can only visualize or try to imagine what the conditions would be that we would have to deal with on this new proposed basis; and having regard for the fact that all of the territory has been built up on the old basis of handling, I can conceive of very great difficulties and changes in facilities involving possibly the tearing down of immense buildings, and the construction of new facilities adequate to take care of the peak requirements, that make of this something that—well, it impels me to say that it is almost impossible, except at an enormous expenditure of money that would not be at all justified in my opinion" (T. 256).

Still again Mr. O'Brien testified that making direct shipments to all of the various firms which receive direct shipments of live stock would be a task beyond anything with which he had ever had to deal (T. 260).

The figures quoted above indicate that approximately 35 per cent. of all of the hogs received at the Union Stock Yards & Transit Company for the first six months of 1931 were consigned direct to the packing companies located adjacent to the stock yards and all of them are industries on the rails of the Chicago Junction Railway Company.

Certainly, in view of the above situation, no one could assert that the circumstances and conditions surrounding the delivery of live stock to either complainant, or any other packing company located in the stock yards district, on the rails of the Chicago Junction Railway Company, is even remotely, let alone substantially, similar to the receipt of live stock by rail at the plant of intervener, located, as it is, two and one-half miles north of the stock yards district, on the rails of the Chicago, Burlington & Quincy Railroad Company and away from all of the influences and advantages of being located in and a part of probably the greatest live stock market in the world. Even assuming the switching haul is the same, and there is absolutely no proof of that fact, there is no more similarity between the circumstances and conditions surrounding intervener's receipt of live stock by rail and the receipt of live stock by rail within the stock yards district than if intervener were located entirely away from Chicago.

We, therefore, respectfully submit that the Commission must find that there is no substantial identity of circumstances and conditions as between complainant and intervener.

**7. There Is No Proof of the Amount of the Absorption by Line-Haul Carriers in Deliveries to Intervener's Plant.**

While there is much testimony in the record that the amount of absorption of switching charges in cases of direct shipments to the plant of the complainant would

be \$12.00 per car, there is absolutely no testimony as to the specific amount, if any, the various line-haul carriers, other than the Chicago, Burlington & Quincy Railroad Company, absorb in connection with shipments of live stock made to the plant of intervenor. The record shows that intervenor pays the Chicago rate, plus \$2.70 per car. The record further shows that this rate was prescribed by the Commission in *Omaha Packing Company v. C. M. & St. P. Ry. Co.*, 37 I. C. C. 378. The record does not, however, show in what manner this charge is divided, whether the Chicago, Burlington & Quincy Railroad Company only gets \$2.70 or whether some greater or lesser amount is paid. A showing of the exact amount of the switching absorption is one of the primary essentials of the case of complainant in making out a violation of either section 2 or section 3. The record does not even show what the switching charge of the Chicago, Burlington & Quincy Railroad Company would be for that haul or any other switching movement. In failing to make any proof whatsoever, complainant has failed in one of the first essentials of its case and the Commission should accordingly find that there is no violation of either section 2 or section 3 in so far as intervenor is concerned.

**8. Complainant Has Made No Proof of Damage by Reason of the Alleged Violation of Section Three.**

There was little or no evidence offered as to the damage done to complainant by reason of the alleged undue preference. The only witness, who testified at all on the

subject, stated that complainant and intervener both sold some of the same commodities in the same territory in Chicago (T. 202). The extent of the competition was not shown. It was not shown that intervener was able to sell cheaper or undersold complainant or that complainant was forced to sell below its normal price by reason of any advantage which intervener is alleged to have.

The record shows that there are at least seventeen other packers in Chicago, many of which are much larger than either complainant or intervener. The witness for complainant stated that there is general competition here among all packers (T. 202). No attempt was made by any witness to go into the question of marketing products in Chicago and how prices were fixed, etc. Obviously, most of complainant's competition comes from packing companies located at the stock yards and it is extremely doubtful if intervener's alleged advantage is really working any damage to complainant. The other packers all pay the same charges on direct shipments that complainant pays and none of them are claiming any violation of sections 2 or 3. Furthermore, there is no proof that an order which would leave it to the option of the railroad defendants to cause intervener to pay some switching charges would be of any substantial help to complainant. Quite apparently, the only relief complainant is seeking is a decrease in its charges on direct shipments. It now has to pay certain charges at the Union Stock Yards & Transit Company, and if shipments are made direct to complainant's plant, it would

have to pay certain charges to the Chicago Junction Railway Company. It desires to have these removed. That is apparently the only thing which will help complainant.

The Commission has held in a number of cases that a complainant must prove that it suffers an injury and that it will cease if the prejudice is removed, regardless of the manner of removal.

In *Sioux City Grain Exc. v. Chicago, B. & Q. R. Co.*, 173 I. C. C. 506, 510, involving alleged violation of section 3 because of non-absorption of switching charges, the Commission quoted with approval the following quotation from *Duluth Chamber of Commerce v. C. St. P. M. & O. Ry. Co.*, 122 I. C. C. 739, 742:

"But to prove that this discrimination results in a violation of section 3 it must be shown that complainant suffers injury by reason of the discrimination, and that this injury will cease if the discrimination is removed, regardless of the manner of its removal."

In *Hawley Pulp & Paper Co. v. Aberdeen & R. R. Co.*, 168 I. C. C. 747, 749, the Commission stated:

"Although complainant presented testimony to the effect that the granting of this stop-in-transit arrangement to its competitors in the East might enable the latter to ship mixed carloads to markets which they might not otherwise be able to reach, thus intensifying competition, and to obtain thereon the benefit of a lower basis of rates than it enjoyed on similar shipments, defendants urge that this evi-

dence is not sufficient to show undue prejudice. Complainant failed to cite any specific instance where it had lost business either by reason of defendants' failure to accord it the transit service sought or the granting of such service to its eastern competitors; nor has it shown that its competitors were thereby enabled to control any markets or the prices it received for its products. Preference to be unlawful must be undue, and prejudice to one shipper to be undue must be such that it shall be a source of positive advantage to another. *Indianapolis Board of Trade v. B. & O. R. R. Co.*, 129 I. C. C. 675. Here no such showing has been made. Neither has complainant shown that the transit service it seeks is a commercial necessity. *Ohio Farm Bureau Federation v. N. & W. Ry. Co.*, 136 I. C. C. 602. The mere showing that complainant's competitors are accorded lower aggregate charges on some westbound mixed-carload transcontinental shipments than complainant pays on like shipments eastbound is not sufficient to support either allegation of the complaint."

In view of the above decisions, the Commission should find that complainant has failed to prove that the alleged preference to intervener has damaged complainant, and, therefore, it has failed to make out a case under section 3.

**9. Commission Has Already Recognized Substantial Difference Between the Location of Complainant and Intervener.**

The Commission has already recognized that there is a substantial difference in the circumstances and conditions between complainant and intervener. Intervener filed a complaint some ten or eleven years ago, attacking

the practice of the carrier's of loading and unloading live stock at the Chicago Union Stock Yards, while refusing to do it at intervener's plant. This practice was alleged to violate section 3 of the Act. Other packers, in other cities, located away from the public market, also filed similar complaints which were consolidated with intervener's complaint. The case is reported in *Omaha Packing Company v. A. T. & S. F. Ry. Co.*, 66 I. C. C. 44. In discussing the relative location of these plants, the Commission stated (see page 46):

"The packing plants of the complainants are widely scattered throughout the country and respectively served by one or more of the defendant carriers. Adjacent to each plant are stock pens, equipped with chutes and other necessary facilities, into which inbound shipments of live stock are unloaded and from which the animals are transferred to the plants for slaughter. These stock pens are adjuncts of the plants, maintained by or for the benefit of the latter, and are neither terminal facilities of the carriers nor otherwise public in any sense. Some of the plants and adjacent pens are located at points at which there are no public stockyards, as the latter term is defined, although it was suggested at the argument that at more or less of them the carriers may have provided unloading facilities not falling within the definition. Several of the plants are in New England, in which region there is but one public stockyard, located at Brighton, Mass., and used as a market for milch cows, not for the handling of beef cattle intended for slaughter. At other points covered by the complaints public stockyards are maintained, adjacent to which are

packing plants with which complainants are said to come more or less into competition in the purchase of live stock and in the sale of the products. A notable instance is Chicago, where the complainant Omaha Packing Company operates a packing plant and adjacent private pens, situate a considerable distance from the public stockyards operated by the Union Stock Yard & Transit Company and adjacent to which are the plants of some of the principal packers of the country. Another is Cleveland, Ohio, where the complainant in No. 12131 operates a plant near the public Cleveland Union Stock Yards, as do certain competitors, and operates another, with adjacent unloading pens, some 3 miles distant. Another situation is that a public stockyard is maintained at East St. Louis, Ill., while at St. Louis, Mo., having no such facility, one of the complainants and another large concern operate packing plants and accessorial unloading pens."

In holding that the practice of loading and unloading live stock at public markets, and refusing to do it at packing plants located away from public markets, was not a violation of section 3, the Commission stated (see page 49):

"We are also of opinion that the differentiation of the traffic covered by the amendment does not result in unjust discrimination or undue or unreasonable prejudice or preference; and we have more than once emphasized the distinction between mere discriminations or differences in transportation charges and services and those which are unjust or undue and unreasonable. Indeed, in obeying the amendment to the act the carriers do not load and unload live stock at public stockyards for the benefit

of certain shippers or consignees; the service is available to all shippers or consignees who desire it. Whatever the practical advantages may be, the propinquity of certain packers is merely their good fortune, for which the carriers are not chargeable; and the latter are under no duty to make compensating concessions to competing packers less fortunately situated. *There is, in fact, an advantage to the complainants in having their inbound shipments placed alongside their plants in lieu of public terminal delivery*" (italics ours).

Complainant's plant is one of the plants located adjacent to the Chicago Union Stock Yard & Transit Company and referred to, as a group, by the Commission on page 47. Therefore, the Commission clearly found in that case that there was a substantial difference of circumstances and conditions and that obviously there may be advantages one way or the other. In that case the advantage lay with the packers, located adjacent to the Chicago Union Stock Yards in that they had their live stock unloaded and loaded without charge. The Commission decided that this was but an advantage of location, stating:

"Whatever the practical advantages may be, the propinquity of certain packers is merely their good fortune, for which the carriers are not chargeable; and the latter are under no duty to make compensating concessions to competing packers less fortunately situated. *There is, in fact, an advantage to the complainants in having their inbound shipments placed alongside their plants in lieu of public terminal delivery*" (italics ours).

In other words, "every cloud has a silver lining." We now find there are both disadvantages and advantages in being located away from a public stock yards. If the disadvantages are not "undue or unreasonable" because they are caused by location, likewise the advantages are not "undue or unreasonable" for the same reason.

The advantage, if any, in this case certainly is solely one of location and because intervener is an industry located immediately adjacent to the right of way and tracks of the Chicago, Burlington and Quincy R. R. Company, while complainant is located adjacent to the right of way of a purely switching railroad. Obviously there may be many advantages in the latter location which are not enjoyed by intervener, but there is one disadvantage which cannot be overcome in being located on a purely switching road, and that is that in movements over said switching road, necessarily, switching charges are involved. Furthermore, because it has no line haul, it is in no position to take advantage of reciprocal switching arrangements. This was recognized by the Commission in *Omaha Packing Co. v. C. M. & St. P. Ry. Co.*, 37 I. C. C. 378, 380, where the Commission stated:

"The stockyards are situated on a switching road that cannot participate in reciprocal switching, while complainant's plant is located on the rails of a line carrier which serves 302 industries in Chicago."

The Commission has repeatedly recognized that advantages or disadvantages of location are not undue or unreasonable under sections 2 or 3 of the Act. For ex-

ample, in *Port Arthur Board of Trade v. A. & S. Ry. Co.*, 27 I. C. C. 388, 402, the Commission stated:

"Unjust discrimination by carriers can not be predicated upon their failure or declination to remove, by preferential rates, services, or privileges, the natural disadvantages of location under which one community rests in competition with another that is more favorably located. We have consistently held that it is not our province to adjust rates for the purpose of equalizing natural or commercial advantages. Neither may the carriers lawfully do so. *Red River Oil Co. v. T. & P. Ry. Co.*, 23 I. C. C. 438. The interstate commerce act is not intended to equalize fortune, opportunities, or abilities. *I. C. C. v. Dittenbaugh*, 222 U. S. 42, 46."

In *Rates on Sand, Gravel and Crushed Stone*, 177 I. C. C. 123, 133, a good illustration is given of the type of advantage, due solely to location, and which is not undue. In that case the Commission held that the fact that a shipper can use a single line haul under a lower rate than another shipper who must use a joint line haul under a higher rate, does not confer upon the first one an undue advantage under section 3.

That is very much the same situation in this case. The advantage, if any, is because intervener is located away from the stock yards district, on the right of way of a line-haul carrier, while complainant is located at the stock yards on the right of way of a switching carrier.

**NO ALTERNATIVE ORDER SHOULD BE ISSUED IN THIS CASE.**

Even if the Commission should find that there is a violation of either sections 2 or 3, it should not give to the defendants the alternative of removing the discrimination or preference, by either increasing intervener's charges or decreasing the charges of complainant. If an order of this sort is entered, the carriers will probably increase intervener's charges. This will not help complainant any and will only create a new discrimination. If the order related to the charges now received by the Union Stock Yards & Transit Company, an alternative order would probably require intervener to pay yardage charges on live stock where no yardage, weighing, watering, feeding, unloading, driving and/or other handling was rendered and where intervener, at its own expense, had performed for itself all this service. Such a procedure would be both unreasonable and discriminatory as no other shipper of live stock is required to pay for services it does not receive.

If the order related to the charges which are made by the Chicago Junction Railway Company, an alternative order would probably cause the defendants to charge intervener an amount equal to the Chicago Junction switching charge, less \$2.70 per car, or \$9.30 per car. This would cause intervener to pay the Chicago Junction switching charge when no switching was performed for intervener by the Chicago Junction.

To require intervener to pay the additional amount of \$9.30 per car (\$12.00 minus \$2.70) would certainly unduly prejudice intervener and discriminate against it when the seventeen packers located in the stock yards district receive their live stock at the chutes of the Union Stock Yards & Transit Company without any charge above the Chicago rate except the \$2.70 per car terminal charge. Intervener now pays this terminal charge although it makes no use of the rails of the Chicago Junction. An order which would permit an increase in intervener's rates, without a corresponding increase in the rates to the stock yards, would also be in direct conflict with the decision of the Commission in *Omaha Packing Company v. C. M. & St. P. Ry. Co.*, 37 I. C. C. 378, where the Commission prescribed the present rates to intervener's plant. In that case intervener sought the Chicago rate, without the terminal charge. The defendants contended that the terminal charge should be added "to avoid discrimination against complainant's competitors in the stock yards district." The Commission added the terminal charge to the Chicago rate, thus recognizing that the rates to intervener's plant and the unloading chutes of the Union Stock Yards & Transit Company should be on a parity. An alternative order in this proceeding would probably destroy that parity and create a new discrimination.


**CONCLUSION.**

We believe we have shown the lawfulness of the present rates to intervener's plant, and that there has been no proof that the existence of these rates violates sections 2 and 3. Therefore, the Commission should find that the allegations in respect to said sections 2 and 3 have not been sustained.

Respectfully submitted,

ROSS DEAN RYNDER,  
WILLIAM N. STRACK,  
*Attorneys for Intervener,*  
4015 Packers Avenue,  
Chicago, Illinois.

March 12, 1932.



EASTBOUND RUNNING TRACK  
TO PUBLIC STOCK YARD

APPENDIX B

